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No. 04-679

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, Attorney General, State of California, *Petitioner,*

v.

ROBERT E. KENNEDY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following *Britt v. North Carolina*, 404 U.S. 226 (1971), the California Supreme Court ruled that an indigent defendant is presumptively entitled to a complete record of all prior proceedings in the event of a trial following a mistrial, and that a total denial of any such records constitutes "structural error," reversible per se. *People v. Hosner*, 15 Cal. 3d 60, 538 P.2d 1141, 123 Cal. Rptr. 381 (1975) (*Hosner*). On appeal of a conviction following respondent Kennedy's retrial, the state court of appeal ruled that the trial court erred under *Hosner* in providing Kennedy only transcripts of witness testimony in the prior trial. Reasoning that the trial court had "substantially complied" with *Hosner* by providing transcripts of witness testimony, the state appellate court concluded that a harmless-error test applied. Evaluating the error for prejudice under *Chapman v. California*, 386 U.S. 18 (1967) (*Chapman*), the state appellate court found the error harmless beyond a reasonable doubt.

On appeal of the district court's denial of Kennedy's petition for writ of habeas corpus, a divided panel of the Ninth Circuit Court of Appeals, in an opinion authored by Judge Stephen Reinhardt, ruled that the state appellate court's approach to its finding of trial court error was "contrary to" and "an unreasonable application" of *Britt v. North Carolina*, because this Court has not recognized a "substantial compliance" qualification to *Britt's* substantive requirement. However, the Ninth Circuit agreed that where the state fails to provide only a portion of the prior transcript, a harmless-error test applies. Without examining the state appellate court's application of the *Chapman* harmless error test, the Ninth Circuit proceeded to apply its own harmless-error inquiry under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (*Brecht*).

In *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003), this Court held that a federal court may not grant habeas relief, "if the state court simply erred in concluding the State's errors were harmless; rather, habeas relief is appropriate only if the [State] Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner."

Accordingly, the question presented is:

1. If a state appellate court arguably misapplies this Court's precedent in an analysis that nonetheless results in a *correct* finding of constitutional error and a *correct* decision to review that error for lack of prejudice beyond a reasonable doubt under *Chapman*, may a federal court grant habeas corpus relief by engaging in an independent harmless-error determination under *Brecht*, without first determining that the state court's harmless-error conclusion was "objectively unreasonable"?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-

BILL LOCKYER, Attorney General, State of California, *Petitioner,*

v.

ROBERT E. KENNEDY, *Respondent.*

Bill Lockyer, Attorney General of the State of California [hereinafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The amended slip opinion of the Ninth Circuit, No. 01-55246 (August 18, 2004), which is reported at 2004 Daily Journal Daily Appellate Report 10236, is contained in Appendix (App.) A. The slip opinion of the Ninth Circuit, No. 01-55246 (June 14, 2004), which was reported at 372 F.3d 1013 (2004), is contained in App. C. The unreported order of the District Court is contained in App. D. The unreported Report and Recommendation of the Magistrate Judge is contained in App. E. The unreported slip opinion of the California Court of Appeal, Fourth Appellate District, Division One (hereinafter state appellate court), case no. D027718 (September 8, 1998) is contained in App. F.

STATEMENT OF JURISDICTION

The amended opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 18, 2004. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

Section 1 of the Fourteenth Amendment states, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(a), provides in relevant part that a federal court may entertain a habeas corpus application "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(d), part of the AEDPA, Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2244, et seq., provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

STATEMENT OF THE CASE

Police Detective McDowell was working an undercover narcotics operation in an area of San Diego known for rock cocaine sales. McDowell saw Kennedy and another person, Randall Tucker, across the street. McDowell made eye contact with Kennedy and nodded his head to indicate that he was asking if Kennedy was selling a controlled substance. Kennedy gestured for McDowell to cross the street.

McDowell approached the two men and asked, "Are you serving?", meaning in street terminology "are you selling a controlled substance?" Subsequently, Tucker responded, "What do you want?" McDowell said he wanted a "2-0," which in street terminology means $20 of rock cocaine or another controlled substance. Kennedy asked for money, and McDowell took a $20 bill from his pocket and gave it to Kennedy. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked to a nearby fence, picked up a paper bag, and handed it to McDowell. The paper bag contained pieces of an off-white, rock-like substance.

McDowell told Tucker it was not enough and asked him either to give more or return part of his money. Kennedy told McDowell to come back later. Tucker asked McDowell if he was a police officer and McDowell walked away. Police arrested Kennedy and Tucker. In Kennedy's pocket they found a $20 bill with numbers which has been previously recorded by the police. The paper bag contained .08 grams of an uncontrolled substance. App. E at 122a-123a; App. F at 150a-151a.

Kennedy's first jury trial ended when the jury deadlocked and the court declared a mistrial. At the close of that trial, Kennedy's defense attorney requested a transcript be prepared. When the trial court ordered preparation of the trial testimony

only, Kennedy's attorney stated, "that's fine." Later, 1996, the trial court granted Kennedy's request to proceed in pro per and appointed advisory counsel to assist him at trial. Ten days later, the trial court ascertained the trial testimony had been transcribed and given to Kennedy. Kennedy requested a more complete transcript, including motion hearings, opening statements, and closing arguments and stated he generally needed the materials to prepare for retrial. The trial court denied Kennedy's request. A month later, just before the second trial, Kennedy relinquished his right to represent himself and the court appointed his advisor as trial counsel. App. E at 128a-129a, 131a n.4; App. F at 152a.

Kennedy's second trial concluded with a guilty verdict for selling a substance in lieu of a controlled substance (Cal. Health & Safety Code § 11355 (West 2004)). In a bifurcated hearing, the court also found true two no probation prior convictions (Cal. Penal Code § 1203(e)(4)), two prison prior convictions (Cal. Penal Code § 667.5(b)), and two prior serious or violent felony convictions or "strikes" (Cal. Penal Code § 667(b)-(i)). Kennedy had been convicted in 1981 for forcible rape with a deadly weapon, and in 1985 for voluntary manslaughter. The trial court sentenced Kennedy to a state prison term of twenty-five years-to-life (Cal. Penal Code §§ 667(e)(2) and 1170.12(c)(2)). App. E at 124a; App. F at 149a.

The state appellate court, affirmed the judgment. App. E at 149a. On direct appeal, Kennedy argued the judgment must be automatically reversed because his right to equal protection was violated when the trial court denied him a transcript of his first trial that included all motions, opening statements and closing arguments. App. F at 150a, 152a. The state appellate court noted that, in *Hosner*, 15 Cal. 3d at 64, the California Supreme Court held that an indigent criminal defendant is presumed to have need of a transcript of prior proceedings to present an effective defense. Further, the *Hosner* court stated that, "the

erroneous denial of an indigent defendant's motion for a free transcript of a prior trial requires automatic reversal." App. F at 153a (quoting *Hosner*, 15 Cal. 3d at 70).

The state appellate court determined that, assuming Kennedy's request for the additional portions of the transcript was timely, the trial court should have provided it. The appellate court, however, did not hold that such a denial was reversible error. In contrast to *Hosner*, where the indigent criminal defendant was entirely denied a transcript of the prior proceedings, the appellate court held the trial court "substantially complied" with *Hosner* because Kennedy was afforded a free transcript of all the testimony at his first trial. The appellate noted that, as suggested in *Hosner*, Kennedy had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. The state appellate court declined "to require per se reversal when, with defense counsel's acquiescence, the court provides an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript." App. F at 153a.

The state appellate court also found that Kennedy had not shown that the trial court's denial of his request for the additional portions of the transcript was prejudicial. As an example of prejudice, Kennedy indicated that, prior to his first trial, his defense counsel requested that if Kennedy's statement to a police officer Mendez were mentioned, any gang reference be excised. Defense counsel asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated that such was his intention and he had mentioned it to Mendez. He noted that this evidence could become relevant if Kennedy and Tucker minimized their relationship with each other. The trial court ruled gang membership would not be mentioned, unless it became relevant during trial. On retrial, Officer Mendez did not testify.

Detective McDowell, however, testified that after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz" and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [sic] want to be gang members." The prosecutor then questioned McDowell and suggested, as an alternative, that the term was used to refer to a person from one's own neighborhood, and McDowell agreed. The state appellate court concluded that the allusion to gang membership was not significant to the verdict and Kennedy had not shown prejudice. App. F at 153a-154a.

Kennedy filed a federal habeas corpus petition in the United States District Court for the Southern District of California. App. E at 125a. A United States magistrate judge reviewed Kennedy's claim that the trial court violated his right to equal protection when it refused to provide him with a complete transcript of his first trial. App. E at 128a-132a. The court analyzed Kennedy's claim under the AEDPA standard and denied habeas corpus relief because Kennedy failed to demonstrate that the state appellate court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law as set forth in *Britt*. App. E at 131a, 132a.

In denying Kennedy's claim, the magistrate judge stated:

> There is no dispute that [Kennedy] was entitled to at least some portion of the transcript of the first trial. Indeed, the trial court recognized [Kennedy's] constitutional right to a transcript and provided him with a transcript of all testimony from the first trial. The issue is whether clearly established Supreme Court law requires that the State have provided [Kennedy] with a *complete* trial transcript, including all motion hearings, opening statements, and closing arguments.

> As noted by the state appellate court, the trial court provided [Kennedy] with a complete transcript of the trial testimony. Thus, the state appellate court concluded that [Kennedy] had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. *See People v. Kennedy*, No. D027718, unpublished slip op. at 6. App. E at 130a-131a.

The magistrate judge noted that Kennedy failed to allege that the denial of his request for a transcript of motion hearings, opening statements, or closing arguments prejudiced him in any way. Accordingly, the magistrate judge found that, even if the trial court erred in failing to provide Kennedy with the entire transcript of his first trial, any such error was harmless beyond a reasonable doubt. App. E at 132a.

The magistrate judge recommended dismissal of the petition (App. E at 147a), and the district court adopted the magistrate's recommendation (App. D at 118a). The district court granted a certificate of appealability, in part, that included the following claim: "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of [Kennedy]'s rights and whether it was harmless error." App. D at 119a (emphasis added).

Kennedy appealed the district court's dismissal of his habeas corpus petition, maintaining his right to due process and equal protection had been violated when the state trial court denied his request for a full transcript of his first trial. App. C at 70a. Kennedy argued, however, that the failure to provide him with the entire transcript of his first trial was structural error. App. C at 91a n.15, and at 107a.

Writing for a majority panel of the Ninth Circuit Court of Appeals, Judge Stephen Reinhardt concluded that this Court's

cases clearly establish that, on retrial, an indigent criminal defendant "must be provided with a transcript of prior proceedings which includes, among other things, motions and the court's rulings thereon, opening statements, closing arguments, jury instructions and relevant colloquies." App. A at 19a; App. C at 82a. The Ninth Circuit concluded that the state appellate court's decision was contrary to this Court's established precedent because the state appellate court created a doctrine of "substantial compliance" which added an additional factor to *Britt* (App. C at 83a-84a, 87a), or alternatively that it was an unreasonable application of *Britt* (App. C at 88a-89a n.13.), and that denying Kennedy a "full transcript" of the prior proceedings for use in relation to his second trial was "substantial and injurious" under *Brecht*. App. C at 97a. The majority reversed the district court's denial of Kennedy's habeas corpus petition and remanded the matter for issuance of the writ. App. C at 98a.

Respondent filed a petition for panel rehearing and petition for rehearing en banc. App. B at 57a. The Ninth Circuit voted to deny the petition; the dissent voted to grant the petition. An amended opinion was filed on August 18, 2004. App. A at 6a.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted to make clear that under AEDPA a state court's finding under *Chapman v. California*, 386 U.S. 18 (1967) that federal constitutional error is harmless is itself entitled to deferential habeas review and to limit federal habeas corpus relief to the case in which a state court's harmless-error review of a constitutional violation under *Chapman* is either "contrary to" or "objectively reasonable."

In order to reach its published holding reversing a twenty-five years to life sentence under California's Three Strikes Law in

the instant case, the Ninth Circuit found it necessary to hold the state appellate court's decision, which is consistent with Ninth Circuit precedent itself, was both "contrary to" and an "unreasonable application of" this Court's precedent, and then ignore the state appellate court's harmless-error analysis under *Chapman* and engage in independent review under *Brecht*.

AEDPA requires that deference be given to state court adjudications. There is no reason that this deference should stop at the state court's adjudication of whether a constitutional violation occurred, and not be applied to the state court's determination that such a violation was harmless. Yet, when a federal court conducts its own independent review under *Brecht*, as did the Ninth Circuit in the present case, that is precisely what occurs. Nothing in *Brecht* requires a federal court to give deference to, let alone consider, a state court's harmless error analysis. This lack of consideration violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. 362, 436 (2000) ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

The Ninth Circuit's decision also contravenes this Court's rule in *Mitchell v. Esparza*, that a state court's finding that constitutional error is harmless should be evaluated under the AEDPA deference standard of 28 U.S.C. § 2254(d). In *Mitchell*, this Court stated that "a constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Mitchell v. Esparza*, 540 U.S. at 17-18, citing *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. at 24); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). This Court then stated that a federal court may not grant habeas relief "if a state court simply erred in concluding the State's errors were harmless;

rather, habeas relief is appropriate only if the [State] Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. 12 at 18, citing *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003); *see also Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam); *Williams v. Taylor*, 529 U.S. at 410 (An "*unreasonable* application of federal law is different from an *incorrect* application of federal law").

Reversal by this Court is appropriate because the Ninth Circuit obviously committed error by ignoring the state appellate court's conclusion that any error in not supplying Kennedy with a "complete transcript" was harmless beyond a reasonable doubt under *Chapman v. California*. This Court's supervisory power is again needed because of the Ninth Circuit's failure to adhere to AEDPA's strict limitations on the scope its collateral review of state court constitutional adjudications. *See* Sup. Ct. R.10(a); *see also Middleton v. McNeil*, 541 U.S. ___, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (*per curiam*), *rev'g* 344 F.3d 988 (9th Cir. 2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. at 19 (*per curiam*), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*) *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 1992). Once again, the Ninth Circuit's decision is "nowhere close to the mark," *Yarborough v. Alvarado*, 541 U.S. ___, 124 S. Ct. 2140, 2150, 158 L. Ed. 2d 938 (2004) *rev'g Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2004).

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE STATE COURT'S HARMLESS-ERROR ANALYSIS UNDER *CHAPMAN V. CALIFORNIA*, ITSELF, VIOLATES THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS RELIEF AND ALSO CONTRAVENES THIS COURT'S PRECEDENT

In the present case, the Ninth Circuit independently reviewed the record to conclude under *Brecht*, that the denial of a complete record to Kennedy had a "substantial and injurious effect of the jury's verdict." App. C at 90a. The Ninth Circuit never analyzed whether the state appellate court's harmless-error analysis under *Chapman v. California* (App. F at 153a-154a), was objectively unreasonable as required by this Court's rule in *Mitchell v. Esparza*, 540 U.S. at 18. In a rehearing petition, the State argued that the Ninth Circuit failed to follow *Mitchell* and its prescription that a state court's harmless error analysis be evaluated under AEDPA's deference standard. App. B at 59a, 65a. Nevertheless, the Ninth Circuit's modified opinion remained essentially unchanged and disregarded this Court's rule in *Mitchell v. Esparza*. App. A at 27a.

Certiorari review should be granted because there is no reason that AEDPA deference should stop at the state court's adjudication of whether a constitutional violation occurred, and not be applied to the state court's rationale in finding that a constitutional violation was harmless under *Chapman*. However, if a federal court on habeas corpus conducts its own independent review under *Brecht*, as did the Ninth Circuit in the present case, a failure to give deference under AEDPA is precisely what occurs. Nothing in *Brecht* requires a federal court to give deference to, let alone consider, a state court's

harmless error analysis. This lack of consideration violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. at 436 ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

Also, this Court should grant certiorari to secure uniformity of decisions under AEDPA because federal courts of appeal have adopted varying approaches to the question whether a federal habeas court, in evaluating the harm of a constitutional violation, should review the reasonableness of the state court's application, if any, of *Chapman* or should independently determine the harmlessness of the error under *Brecht*. The Tenth Circuit has held that a habeas corpus court must first determine whether the state court's harmless error analysis was objectively unreasonable under the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1) and if so, then determine whether the error was harmless under *Brecht*. *Cargle v. Mullin*, 317 F.3d 1196, 1220, 1224 (10th Cir. 2003); *see also Saiz v. Burnett*, 296 F.3d 1008, 1012-1013 (10th Cir. 2002) (holding that if the state court correctly applied *Chapman*, federal courts do not apply *Brecht* unless the state court's *Chapman* analysis violated AEDPA). In contrast, the Fifth and Sixth Circuits have held that a habeas court should determine the harmlessness of the error independently under *Brecht*. *Robertson v. Cain*, 324 F.3d 297, 306-307 (5th Cir. 2003); *Hill v. Hofbauer*, 337 F.3d 706, 718 (6th Cir. 2003), *citing Nevers v. Killinger*, 169 F.3d 352, 371-372 (6th Cir. 1999).

The Ninth Circuit recently held that "if a federal court applies a harmless error standard in the first instance, the *Brecht* standard governs." But when the state court has conducted a harmless error analysis, a federal court on habeas review must "first decid[e] whether the state court's harmless error analysis is objectively unreasonable and, if so, [then apply] *Brecht*."

Medina v. Hornung, 372 F.3d 1120, 1126 (9th Cir. 2004) (applying the approach taken by this Court in *Mitchell v. Esparza*, 540 U.S. at 17-18.) However, the Ninth Circuit later amended the decision to eliminate this portion of the opinion, and instead independently applied *Brecht*. *Medina v. Hornung*, ___ F.3d ___, 2004 Daily Journal D.A.R. 12127 (9th Cir. September 29, 2004). The Ninth Circuit's amendment of *Medina* occurred after the Ninth Circuit's amended opinion was filed in the instant case on August 18, 2004. App. A at 1a. Even after *Mitchell*, the Ninth Circuit suggested that independent review under *Brecht* continues as it did before AEDPA. *See Picazo v. Alameida*, 366 F.3d 971 (9th Cir. 2004).

In *Mitchell v. Esparza*, this Court held that where a state court conducted a harmless error review under *Chapman*, a federal court may not grant habeas relief without first concluding that the state court's application of *Chapman* was unreasonable: "We may not grant respondent's habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is inappropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. at 18. Further, since 1999 when the Sixth Circuit authored *Nevers v. Killinger*, this Court has repeatedly emphasized, and given teeth to, the deference that is required under AEDPA. See, e.g., *Middleton v. McNeil*, 124 S. Ct. at 1832-1833; *Yarborough v. Alvarado*, 124 S. Ct. at 2149-2151; *Yarborough v. Gentry*, 540 U.S. at 4-6; *Lockyer v. Andrade*, 538 U.S. at 70-75; *Woodford v. Visciotti*, 537 U.S. at 21-26; *Early v. Packer*, 537 U.S. at 7-11; *Williams v. Taylor*, 529 U.S. at 436. It is now beyond dispute that it is *not* sufficient that a federal habeas court, in its "independent view," is left with the "firm conviction" that the state court ruling was erroneous. *Lockyer v. Andrade*, 538 U.S. at 75. "Objectively unreasonable" does not equate with "clear error": "The gloss of

clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.*

The approach advocated by the Ninth Circuit and other circuits of the federal courts of appeal that a finding of constitutional error triggers an independent harmless-error review under *Brecht*, does not require the habeas court to give deference to, let alone consider, a state court's harmless error analysis. Accordingly, this Court should grant certiorari to secure a uniformity of decisions by clarifying whether this approach violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. at 436 ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

II.

THE NINTH CIRCUIT'S GRANT OF HABEAS RELIEF BASED MERELY ON ITS INDEPENDENT HARMLESS-ERROR REVIEW UNDER *BRECHT* CONTRAVENES THIS COURT'S RULE IN *MITCHELL V. ESPARZA* THAT SUCH RELIEF IS APPROPRIATE ONLY IF THE STATE COURT'S HARMLESS-ERROR REVIEW WAS APPLIED IN AN OBJECTIVELY UNREASONABLE MANNER

Under the AEDPA deference standard as it has developed over the last five years, it can now no longer be claimed that if a habeas petitioner is able to demonstrate an error was substantially injurious under *Brecht*, then it necessarily follows, that a state court reaching a contrary conclusion under *Chapman* unreasonably applied that decision. See, e.g., *Middleton v. McNeil*, 124 S. Ct. at 1832-1833; *Yarborough v. Alvarado*, 124 S. Ct. at 2149-2151; *Yarborough v. Gentry*, 540 U.S. at 4-6; *Lockyer v. Andrade*, 538 U.S. at 70-75; *Woodford v. Visciotti*,

537 U.S. at 21-26; *Early v. Packer*, 537 U.S. at 7-11; *Williams v. Taylor*, 529 U.S. at 436. That is, even if a federal court would independently have reached a different conclusion applying a higher threshold standard of review, it cannot be said that the state court decision was, therefore, "contrary to" or an "objectively unreasonable" application of this Court's precedent. If a state court has found federal constitutional error and then made a good faith application of the harmless-error standard announced by this Court in *Chapman*, the federal habeas court must first determine whether the state court's harmless-error determination was "contrary to" or an objectively "unreasonable application" of *Chapman* and, if so, then apply *Brecht*.

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 639-640 (2003). The phrase "clearly established Federal law, as determined by the Supreme Court of the United States refers to holdings, as opposed to dicta, of this Court's decisions as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. at 412. An adjudication is "contrary to" federal law if it fails to apply the correct controlling authority, or if it applies the correct controlling authority incorrectly to a case involving facts "materially indistinguishable" from those in the controlling decision. *Id.* at 405-406; *see also Early v. Packer*, 537 U.S. at 7-8.

A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's decisions, but unreasonably applies it to the facts of the petitioner's case.

Williams v. Taylor, 529 U.S. at 406; *see also Wiggins v. Smith*, 539 U.S. 510 (2003). In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to a "set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. at 76 (*citing Williams v. Taylor*, 529 U.S. at 407.) In order for a federal court to find a state court's application of this Court's precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. *Lockyer v. Andrade*, 538 U.S. at 75. The state court's application must have been "objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 409. As this Court stated in *Mitchell v. Esparza*, "[a] constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Mitchell v. Esparza*, 540 U.S. at 17-18, *citing Neder v. United States*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. at 24; *see also Delaware v. Van Arsdall*, 475 U.S. at 681.

In *Britt*, 404 U.S. at 227, this Court held that held that Britt himself was not entitled to a transcript because he had access to the court reporter who would have read-back any portion of his first trial upon his request as an "adequate substitute" to the transcript. *Id.* at 228. Here, the Ninth Circuit concluded the state court's decision was "contrary to" this Court's established precedent when it held that, in providing Kennedy with only a transcript of the prior testimony, the trial court "substantially complied" with *Britt* . App. A at 20a-21a, 24a-25a; App. C at 83a-84a, 87a-88a; *see* App. F at 153a. In a footnote, the Ninth Circuit alternatively concluded the state appellate court's holding was an objectively unreasonable application of *Britt*. App. A at 25a-26a n.13; App. C at 88a-89a n.13.

The Ninth Circuit stated that if the state had completely failed to provide an indigent defendant with a transcript of a mistrial for use on retrial, it would likely find structural error, requiring

automatic reversal. Where a portion of the transcript is provided, the Ninth Circuit concluded that a harmless error analysis applies. App. A at 26a; App. B at 89a. The Ninth Circuit then independently reviewed the record to conclude under *Brecht*, that the failure to provide a complete transcript had a "substantial and injurious" effect on the jury's verdict. App. A at 27a; App. C at 90a.

The Ninth Circuit, however, never analyzed whether the state appellate court's harmless-error analysis under *Chapman v. California* (App. F at 153a-154a), was objectively unreasonable as required by this Court's rule in *Mitchell v. Esparza*, 540 U.S. at 18. As a result, the Ninth Circuit found constitutional error and granted habeas corpus relief in a case where the state court's harmless error analysis under *Chapman* was never found to be "objectively reasonable."

In the present case, the state appellate court noted that Kennedy had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. The state appellate court declined "to require per se reversal when, with defense counsel's acquiescence, the court provides an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript." App. F at 153a. The state appellate court also concluded that Kennedy had not shown that the trial court's denial of his request for the additional portions of the transcript was prejudicial. As an example of prejudice, Kennedy indicated that, prior to his first trial, his defense counsel requested that if Kennedy's statement to a police officer Mendez were mentioned, any gang reference be excised. Defense counsel asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated that such was his intention and he had mentioned it to Mendez. He noted that this evidence could become relevant if Kennedy and Tucker minimized their

relationship with each other. The trial court ruled gang membership would not be mentioned, unless it became relevant during trial. On retrial, Officer Mendez did not testify. Detective McDowell, however, testified that after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz" and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [*sic*] want to be gang members." The prosecutor then questioned McDowell and suggested, as an alternative explanation, whether the term was used to refer to a person from one's own neighborhood, and McDowell agreed. The state appellate court concluded that the allusion to gang membership was itself not significant and Kennedy had not shown prejudice from not having the complete record. App. F at 153a-154a.

Instead of reviewing the state appellate court's harmless-error analysis, the Ninth Circuit embarked on its own independent review and construction of the record to determine if the error was harmless under *Brecht*. The Ninth Circuit relied on its concept of "social justice" to rule that if Kennedy's counsel on retrial had access to the transcript of pretrial proceedings, which included the motion to exclude gang-related evidence and the trial court's favorable ruling, it had little doubt that Kennedy's counsel in the second trial would have brought a similar motion. App. A at 47a-48a, 48a at n.7; App. C at 92a-93a; 93a n.16. The Ninth Circuit concluded that, under the general law of the case doctrine, the court on retrial would have been bound by the previous decision to exclude any gang testimony from Kennedy's mistrial, such that any motion by Kennedy to exclude such testimony would have had "a substantial likelihood of success." App. A at 52a-53a; App. C at 92a-93a. The State's petition for rehearing en banc, however, indicated an important legal flaw in the Ninth Circuit's assessment of prejudice in this case. The law of the case doctrine actually does not apply to trial court decisions in California. App. A at

53a, citing 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1997) (collecting cases).

Although the Ninth Circuit corrected these errors in its amended opinion, its finding of prejudice remained the same. As a dissent pointed out, it was not objectively unreasonable for the state appellate court to conclude that any constitutional error was harmless. *See* App. A at 53a.

The Ninth Circuit also stated in its prejudice analysis that the prosecutor had a distinct advantage in this case because he was present during all of the proceedings both before and during the first trial. App. C at 97a. According to the majority, the prosecutor took advantage of Kennedy's counsel's lack of knowledge of the prior trial court's order prohibiting testimony of gang involvement or association in order to deliberately elicit such testimony from Detective McDowell to establish Kennedy's guilt. App. C at 92a, 94a. The State's petition for rehearing en banc, however, revealed that *different* prosecutors handled Kennedy's two trials. As found by the dissent, the majority's *factual predicate was utterly baseless*. *See* App. A at 49a-50a.

Similarly, the Ninth Circuit's conclusion that the prosecutor deliberately elicited gang testimony from Detective McDowell was also faulty. In its decision, the state court noted that beyond Detective McDowell's statement that "a lot of people use ['cuz']," the *prosecutor* elicited an acknowledgment from McDowell that the term often refers to people from one's own neighborhood. App. A at 50a; App. C at 113a; *see* App. F at 154a. The dissenting judge stated that, it was perhaps for that reason that Kennedy's counsel *never objected* to McDowell's testimony regarding gang affiliation because, when considered in context, McDowell's "allusion to gang membership was not significant." App. A at 50a; App. C at 113a; App. F at 154a, 162a. Given the new prosecutor's efforts to minimize the

impact of the insignificant allusion to gang membership, and in light of the severe gaps in the majority's speculative claim of causation between any alleged *Britt* error and the introduction of gang evidence on retrial, it was not objectively unreasonable for the state appellate court to have concluded that any constitutional error was harmless. App. A at 53a.

There were other reasons to believe that McDowell's allegedly prejudicial statements did not impact the jury's determination that Kennedy had committed the charged offense. App. A at 53a; App. C at 115a. In addition to the detective's persuasive testimony regarding the circumstances of Kennedy's sale of a non-controlled substance in lieu of a controlled substance, Randall Tucker testified to delivering to McDowell the paper bag containing the non-controlled substance, although he denied his intent and any misrepresentation of its contents. As a result of that denial, the prosecutor then lawfully impeached Tucker with evidence that he had pled guilty to the very same offense at issue at Kennedy's trial. App. A at 53a; App. C at 115a. Given this powerful trial testimony suggesting Kennedy's guilt, it is difficult to think that the jury's verdict would have been different if McDowell had not been allowed to intimate that, among other completely innocuous meanings, the term "cuz" had gang significance. App. A at 54a; App. C at 115a.

In its readiness to attribute error to the state appellate court's decision, the Ninth Circuit ignored the AEDPA deference standard to find that a *Britt* error was substantially injurious under *Brecht*. By doing so, the Ninth Circuit directly contravened Court's rule in *Mitchell v. Esparza*, 540 U.S. at 17-18, that a state court's harmless-error analysis must be found to be "contrary to" or an objectively "unreasonable application" of this Court's precedent as a condition to federal habeas corpus relief.

CONCLUSION

Accordingly, the State respectfully requests a writ of certiorari to issue to the United States Court of Appeals for the Ninth Circuit.

Dated: November 15, 2004.

Respectfully submitted,

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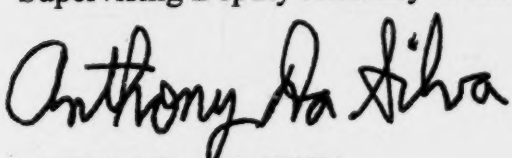

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[Filed June 14, 2004]
[Amended August 18, 2004]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. KENNEDY, Petitioner-Appellant, v. **BILL LOCKYER,** Attorney General, State of California Respondent-Appellee.	No. 01-55246 No. CV-9-02505-BTM **ORDER AND AMENDED OPINION**

COUNSEL

Jeff Dominic Price, Esq,, Santa Monica, California, for the appellant. Lora Fox Martin and Anthony DaSilva, Deputy Attorney Generals, San Diego, California, for the appellee.

ORDER

The majority opinion filed June 14, 2004, slip op. 7843, and appearing at 372 F.3d 1013(9th Cir. 2004), is hereby amended as follows:

1.) Slip op. at 7851, delete: "The prosecutor remained the same for both trials; he, thus, had personal knowledge of all that transpired during the prior proceedings"

2.) Slip op. at 7853, change: "the prosecutor, who was aware" to "the prosecution, which was aware"

3.) Slip op. at 7869, replace the text in footnote 16 with the following:

> Had new counsel had access to the pretrial proceedings, he would undoubtedly have based a motion to exclude on the arguments already presented and on the prior judge's ruling in favor of the defendant. Had he done so, it is reasonable to believe the second trial court would have agreed that there should be no reference to " 'gangs or gang affiliation' unless cleared by the court out of the presence of the jury" given the highly prejudicial nature of gang testimony, notwithstanding that the second court would not have been bound to do so under the "law of the case." doctrine, *See* 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1994).

4.) Slip op. at 7873, delete "where, as here, the prosecutor had a distinct advantage in presenting the government's case, having been present when the defense delivered its opening and closing arguments and throughout all the proceedings both before and during the first trial,"

5.) Substitute for material deleted by 4.) "where, as here, the prosecution had a distinct advantage in presenting the government's case, having knowledge of all that occurred during the course of the first trial."

6.) Slip op. at 7873: Move footnote 20 at the end of page after "during the first trial." to the end of the paragraph on the next page after "not harmless error"' and substitute the following footnote where footnote 20 originally appeared:

The same prosecutorial office conducted the first and second trial, although the lead prosecutor in the two trials was different. Such a change does not affect the analysis of the underlying prosecutorial conduct. *See, e.g, Thigpen v. Roberts,* 468 U.S. 27 (1984) (explaining, in the context of prosecutorial vindictiveness, that a change in prosecutors does not defeat a presumption of vindictiveness); *Santobello v. New York,* 404 U.S. 257(1971) (holding, in the plea bargaining context, that "staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done"); *c.f. Kyles v. Whitley,* 514 U.S. 419, 437 (1995) (holding, in the *Brady* context, that *an* "individual prosecutor has a duty to learn of my favorable evidence known to others . . . ."). Moreover, there is evidence in the record that the first and second prosecutors actually cooperated in matters relating to the second trial. For example, the first prosecutor made appearances at preliminary proceedings involving the second trial and apparently participated in the handling of some of Kennedy's new counsel's discovery requests.

The dissenting opinion is hereby amended as follows:

1.) Slip op. at 7889: Delete the hard return prior to the word "Right?"

2.) Slip op. at 7889: Insert the following text as a new paragraph following the word "Right?"—

Events transpiring after initial publication of the majority's opinion granting Kennedy relief make clear the dangers inherent in my colleagues' eagerness to overreach from the bench. In their prior opinion-helping prove the wisdom of the a adage that "bad facts make bad law"–the majority repeatedly emphasized the bad "fact" that a single

prosecutor was responsible for both of Kennedy's trials. For instance, the court noted in now-deleted language developing the factual basis for its decision that "[t]he prosecutor remained the same for both trials; he, thus, had personal knowledge of all that transpired during the prior proceedings," *Kennedy,* 372 F.3d 1013, 1016-17 (9th Cir. 2004), and it emphasized that "[d]uring the second trial, the prosecutor, who was aware that the prior trial judge had excluded any mention of Kennedy's alleged gang involvement, proceeded, deliberately, to elicit testimony from Detective McDowell on the subject of gangs." *Id.* at 1017. Ultimately, the court concluded,

> In hindsight, it is difficult to conclude that the omitted portions of the transcript would not have been important to Kennedy in preparing an effective defense, particularly where, as here, the prosecutor had a distinct advantage in presenting the government's case, having been present when the defense delivered its opening and closing arguments and throughout all of the proceedings both before and during the first trial.

Id. at 1029-30.

From such factual characterizations, one would have thought this case is, at bottom, about an overzealous prosecutor's nefarious plot to railroad a hapless defendant. How . . . socially unjust! There is only one problem: The State's petition for rehearing en banc–which, by the way, is the first opportunity the State has had to respond to the majority's lawyering at the oral argument-reveals that different prosecutors handled Kennedy's two trials. The majority's factual predicate was utterly baseless.

In the end, one would be hard-pressed to find a better illustration of what *Sophanthavong* had in mind when it

identified how clearly prejudicial it can be for a court to overlook a party's clear waiver (not to mention a party's outright concession, as in this case): "The unfairness of such a tactic is obvious. Opposing counsel is denied the opportunity to point to the record to show that the new theory *lacks legal* or *factual support." Sophanthavong, 365* F.3d at 737 (emphasis added).

3.) Slip op. at 7889: replace the word "eviscerates" with "undermines"

4.) Slip op. at 7891: prior to the paragraph beginning "Finally, I observe . . . ," insert as a new paragraph the following text.

Were this not enough, the State's petition for rehearing en banc drives yet another nail through the heart of the court's opinion. Perhaps the most important step in the majority's logic was its assertion that the court on retrial would have been bound by the previous decision to exclude any gang testimony from Kennedy's mistrial, such that any motion by Kennedy to exclude such testimony would have had "a substantial likelihood of success," *Kennedy*, 372 F.3d at 1027:

> Although we have found no California cases addressing the exact issue presented here, generally "under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997). A second judge will generally follow a ruling made by an earlier judge unless the prior decision was erroneous, is no longer sound, or would create an

> injustice. *Id.* None of the exceptions to the application of this basic doctrine exists here.

Id. at 1027 n.16.

> Not so fast, Like its unsupported (and, until the State's petition for rehearing en banc, unrebutted) assertion that a single prosecutor was responsible for both Kennedy's mistrial and retrial, the majority's resort to generic law of the case principles turns out, again, to have been utterly baseless. For as the State points out in its petition for rehearing en banc–again taking advantage of its first real opportunity to respond to arguments developed and deployed by the majority at oral argument–law of the case doctrine actually does not apply to trial court decisions in California. *See* 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1997) (collecting cases). Poof! Gone is the premise for the majority's speculative prediction that a motion to exclude gang testimony would almost certainly have been granted at retrial; in reality, the majority has absolutely no idea whether a motion to exclude would have been successful or not. At bottom, given the (new) prosecutor's efforts to minimize the impact of the already laughable gang testimony, and in light of the severe gaps in the majority's speculative chain of causation between any alleged *Britt* error and the introduction of gang testimony on retrial, no fair-minded jurist could conclude that it was objectively unreasonable for the Court of Appeal to have determined that any constitutional error was harmless.

With these amendments, the majority of panel has voted to deny the petition for panel rehearing and the suggestion for rehearing en banc. Judge O'Scannlain would grant the petition. The petition for rehearing and the suggestion for rehearing en banc are DENIED.

OPINION

REINHARDT, Circuit Judge:

Robert Kennedy was tried twice on a charge of selling 0.08 grams of a substance in lieu of a controlled narcotic drug – a substance that looked like an illegal drug but wasn't – to an undercover police officer for $20. The first trial ended in a hung jury: four jurors favored finding Kennedy not guilty; eight jurors thought him guilty. Prior to his second trial, Kennedy twice asked the state court to provide him with a complete transcript of the earlier proceeding. It refused to do so. Instead, it granted him only the portion of the transcript that contained the witnesses' testimony and denied him the portion that contained the parties' motions and the court's rulings thereon, as well as the court's instructions and the parties' opening statements and closing arguments.

At the second trial, Kennedy was represented by a new attorney who proceeded without the aid of a complete transcript of the prior trial. Aware that the new attorney did not have the full transcript, the state introduced evidence intended to show gang involvement on Kennedy's part – evidence that had been excluded from the first trial after a successful pre-trial motion to suppress. This time, after a one day trial and three days of deliberations, the jury returned a guilty verdict. Because Kennedy had two prior serious or violent offenses, he was sentenced for the $20 sale of a non-drug to a prison term of twenty-five years to life, pursuant to California's Three Strikes Law, Cal. Penal Code §§ 667(e) and 1170.12(c)(2) (2003).

Kennedy appeals the district court's dismissal of his habeas corpus petition. He argues that his Fourteenth Amendment right to due process and equal protection was violated when the state court denied his request for the full transcript of his first trial. Because the state court's decision was contrary to clearly

established Supreme Court law, we reverse the district court and direct it to grant Kennedy's habeas petition.[1]

I

The Second Trial

The prosecution's principal witness in the second trial, as in the first, was Detective Leroy McDowell of the San Diego Police Department. Detective McDowell testified that he was working undercover narcotics detail in casual clothes one afternoon in October of 1995. Another officer dropped him off near the intersection of 22nd and J Streets in San Diego. McDowell testified that when he saw Kennedy and Randall Tucker across the street, he made eye contact with Kennedy and nodded his head. McDowell said that he approached the two men and asked, "Are you serving?," meaning in street terminology, "Are you selling drugs?" Tucker responded by saying, "What?" McDowell testified that he asked the question again and Tucker responded, "What do you want?" McDowell said he told the two men that he wanted a "2-0," which he testified means $ 20 of rock cocaine or another controlled substance. In response, Tucker asked, "2-0 of what?;" McDowell said he repeated, "2-0."

McDowell said that Kennedy then asked for money, and he took a prerecorded $20 bill from his pocket and gave it to him. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to the fence, picked up a paper bag, and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance. Tucker asked if

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1. In view of our holding, we do not reach Kennedy's two other claims: (1) that he was prejudiced by his counsel's ineffective assistance, and (2) that California's Three Strikes Law is unconstitutionally vague.

McDowell was a police officer, and McDowell said, "No, why would I be down here if I was the police?"

McDowell testified that he looked in the bag, told Tucker that there was not enough there, and asked him to give him some more. Tucker then said, "That's all we have. Come back later we'll give you some more." McDowell then said, "No, at least give me $ 5 of my money back."

McDowell walked away from Kennedy and Tucker and alerted the other officers who were waiting nearby. The officers then moved in and arrested the two. In Kennedy's pocket, they found the marked $ 20 bill. The bag contained 0.08 grams of a "non-controlled substance" that had the appearance of an illegal drug.

Although Tucker pled guilty after the first trial, and thereby avoided a three-strike twenty-five years to life sentence,[2/] he testified for the defense at the second trial. His testimony differed from McDowell's. Tucker testified that he and Kennedy had been hanging out in the area all day and earlier had been stopped and patted down by police, who found nothing on either man. Tucker told the jury that, when McDowell approached the two, no drugs were ever mentioned but that he noticed McDowell had money in his hands. Tucker said McDowell handed the money to him. Because McDowell was "pushing too much," Tucker walked over to a nearby area, picked up a piece of paper bag, and gave it to McDowell. Tucker said "2-0" and "are you serving" can mean different things, and that he did not know what McDowell wanted.

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2. Because Tucker had two prior strikes for violent felonies, if a jury had convicted him of the offense he was charged with, he would in all likelihood have been sentenced to, at a minimum, twenty-five years to life pursuant to California Three Strikes law. Instead, he entered into a plea agreement with the prosecution striking his prior offenses in return for a guilty plea, and received a sentence of 32 months.

In addition to Detective McDowell's testimony regarding the actual event, the prosecution elicited "gang" testimony from him. The prosecutor asked McDowell if he could tell the jury what the word "cuz" meant, as it was used by Kennedy during the transaction. He replied, "Terminology used by Cripp gang members." The prosecutor persisted, "Is it on the street used for – commonly used between individuals that are working together?" McDowell answered, "Generally, it was most – a lot of people use it and – but basically gang members and those that want to be gang members."

Procedural History

The first trial was a joint trial of the two co-defendants. At a pre-trial hearing, Kennedy's counsel moved in limine to exclude all references to any gangs and any gang affiliation; the court granted the motion in a written order which provided that, "There will be no mention of 'gangs or gang affiliation,' unless cleared by the Court, out of the presence of the jury."

During the discussion of the motion, the court explained that evidence of possible gang involvement, if introduced at all, could be used only for impeachment purposes, to prove Kennedy and Tucker's relationship. Before the prosecution could impeach Kennedy on this basis, however, the judge stated that he would hold a hearing outside the presence of the jury, after which he would make a determination as to whether the evidence should be admitted for even this limited purpose. The judge told the prosecutor he would "have to be pretty convincing before [he would] let that [evidence] come in." The transcript of the discussions regarding the motion to exclude and the court's ruling thereon was not given to Kennedy or his counsel prior to the second trial.

As soon as the mistrial was declared, Kennedy's counsel moved for a complete transcript of the first trial in order to

prepare for the expected second trial. The judge ruled that Kennedy was entitled only to a transcript of the trial testimony; he denied him the remainder of the transcript, including the parties' opening statements and closing arguments, evidentiary motions and rulings, jury instructions, and all other motions and colloquies. The following exchange occurred between Kennedy's counsel and the court:

> [Counsel]: Your Honor, I'd also ask for an order for a transcript being prepared for the purpose of the next trial.
>
> [Court]: Well, you can submit that to the court after – I'd – I'd – I would hope that wouldn't be necessary to go to that expense, but I'd like to explore some disposition short of that. But if it's going to trial then I think the case law says that you're entitled to that transcript, just of the testimony, not of the entire trial.
>
> [Counsel]: That's fine, your Honor.
>
> [Court]: All right.

A second trial date was then scheduled. During a pre-trial hearing, Kennedy told the judge that he was dissatisfied with his counsel's representation and moved to proceed *pro se*. The motion was granted and new stand-by counsel was appointed. At the hearing, before relieving counsel of her responsibilities, the court inquired whether she had ordered a transcript of the first trial. She responded that she already had one and would make it available to Kennedy. In fact, however, counsel had only the transcript of the witnesses' testimony at trial, not the full proceedings.

Ten days later, Kennedy, now proceeding *pro se*, asked the court to provide him with a full trial transcript in order to enable him to prepare for the second trial. During the hearing on this

motion, Kennedy told the judge that he did not have his "full trial transcripts" and that he only had the testimony of the witnesses at the first trial. He told the judge that he needed, at the very least, the transcript of "all motions, opening statements, and final argument." Kennedy and his stand-by counsel (who later became appointed counsel)[3] explained that Kennedy needed to review the full transcript so that he could prepare his defense for the second trial. The court denied the request.[4]

During the second trial, the prosecution, which was aware that the prior trial judge had excluded any mention of Kennedy's alleged gang involvement, proceeded, deliberately, to elicit testimony from Detective McDowell on the subject of gangs. The prosecutor asked Detective McDowell what the word "cuz," used by Kennedy during the street discussion, meant. McDowell

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3. At the commencement of Kennedy's second trial, he moved to terminate his *pro se* status and have stand-by counsel appointed as his trial counsel. The motion was granted.

4. The court colloquy regarding this request was:

> [Stand-by Counsel ("Gayton")] It's only the trial testimony that's been made avail-able. I think counsel agreed only – stipulated to trial testimony, because I believe she felt that she was going to be trying the case, Ms. Feral. But since she's not trying the case, he's requesting the full transcript, including all motions, openings statement and final argument.
> (Court] Why does he need that?
> [Gayton] He needs to review that in order to prepare for his next trial.
> [Court] Why?
> [Gayton] He thinks a lot of those –
> [Court] He's entitled to trial testimony. All the motions were in writing, right?
> [Gayton] I don't know, I wasn't there. But, I mean, I consulted with Ms. Feral, and she said that she had requested a full trial transcript . . . .
> [Court] Denied. Anything else?

testified that when Kennedy said, "Give it to him cuz," that "cuz" was "terminology used by Cripp gang members." On further questioning by the prosecutor, McDowell elaborated, stating that "cuz" is a phrase "basically" used by "gang members and those that want to be gang members."

The trial lasted one day, but the jury deliberated for three. During the course of their deliberations, the jurors asked that McDowell's testimony be read back to them. Ultimately, the jury returned a guilty verdict, and the court sentenced Kennedy to a prison term of twenty-five years to life pursuant to California's Three Strikes Law. Cal. Penal Code §§ 667(e) and 1170.12(c)(2).

The California Court of Appeal affirmed the conviction. After the California Supreme Court summarily denied review, Kennedy filed a habeas corpus petition in federal court. The magistrate judge recommended dismissal of the petition, and the district court adopted the magistrate's recommendation. Kennedy appealed.

II

AEDPA Standard of Review

We review *de novo* the district court's decision to grant or deny a petition for habeas corpus. *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000). The petition in this case was filed on November 26, 1999, well after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, AEDPA's provisions apply, and our review of the state court's decision is governed by them.

Under AEDPA, we may grant a writ of habeas corpus to a person in state custody only if the state court's decision was "based on an unreasonable determination of the facts in light of

the evidence presented in State court proceeding," 28 U.S.C. § 2254(d)(2), or the claimed constitutional error "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court's merit determination is "contrary to" United States Supreme Court clearly established law if it applies a rule (1) "different from the governing law set forth in [Supreme Court] cases," *Bell v. Cone*, 535 U.S. 685, 694 (2002), or (2) if it "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Price v. Vincent*, 123 S. Ct. 1848, 1853 (2003).

III

[1] It is well-established that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Applying this fundamental legal principle, the *Britt* Court held that the state is ordinarily required to provide an indigent defendant with the transcript of the proceedings of a prior mistrial in order to aid him in preparing for a second trial. *Id.* at 227-28. Here, the state does not dispute that Kennedy was entitled to a transcript of his prior mistrial. Rather, it contends that, under the relevant Supreme Court cases, an indigent defendant is entitled only to a transcript of trial testimony, not to a full transcript of the proceedings of the prior trial. The state is incorrect.

[2] The Supreme Court held in *Britt* that "the State must provide an indigent defendant with a transcript of *prior proceedings* when that transcript is needed for an effective

defense or appeal." *Id.* at 227 (emphasis added). Although the Court did not define "prior proceedings" in its opinion, the meaning of the term is clear. *Black's Law Dictionary* defines "proceeding," in relevant part, as "the regular and orderly progression of a lawsuit, including *all* acts and events between the time of commencement to the entry of judgment."[5] *Black's Law Dictionary* 1221 (7th ed. 1999) (emphasis added); *see also Black's Law Dictionary* 1204 (6th ed. 1990) ("The proceedings of a suit embrace *all* matters that occur in its progress judicially.") (emphasis in original). From the dictionary definition it follows that the most "natural understanding" of "prior proceedings" is one that encompasses *all* of the acts and events that occur from the commencement of the judicial action until the entry of judgment. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2047 (2003) (adopting the most natural understanding of a given term as defined in the dictionary). Because parties' motions, and the court's rulings thereon, as well as opening statements and closing arguments, and the jury instructions all occur during the course of the judicial action, they are part of the proceedings. In asking this court to limit the meaning of "prior proceedings"

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5. *Black's Law Dictionary* specified that:

> the term proceeding may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of law resort.

Id.

to a transcript of witness testimony, the state would have us construe the term so as to violate its ordinary and plain meaning. We are not free to do so. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470-71 (1997) (refusing to adopt the Commission's reading of a term which violated the term's ordinary and plain meaning).

There is nothing in the Supreme Court's *Britt* decision or in any other Supreme Court case dealing with the provision of transcripts of proceedings that would permit the adoption of as narrow and cramped a reading as the state suggests. Rather, the Supreme Court's other relevant decisions support our adoption of the term's literal construction. For example, the Court in *Griffin v. Illinois*, 351 U.S. 12, 13, n.3 (1956), held that, on appeal, indigent defendants must be provided with a free copy of a "report of proceedings," defined by the Court as "all proceedings in the case from the time of the convening of the court until the termination of the trial[,]" including "all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record."[6/] The Court's adopted definition of "report of proceedings" closely mirrors the dictionary meaning of "proceeding" provided in *Black's*; because of the *Britt* Court's reliance on *Griffin*, we infer that the Court meant its definition of the term "proceedings" to be the same as the definition of "proceedings" used in *Griffin*. *Britt*, 404 U.S. at 227-28. Further, in *Mayer v. City of Chicago*, 404 U.S. 189 (1971), the Court held that on appeal an indigent defendant must be provided with a "full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available

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6. The Supreme Court subsequently extended *Griffin* to require the state to provide indigent defendants with transcripts of (a) state postconviction proceedings, *Long v. District of Iowa*, 385 U.S. 192, 192-94, (1966) (*per curiam*); (b) state habeas evidentiary hearings, *Gardner v. California*, 393 U.S. 367, 370 (1969); and (c) petty offense trials, *Williams v. Oklahoma City*, 395 U.S. 458, 459(1969).

to the defendant with resources to pay his own way." *Id.* at 195. Again, the Court did not define "full verbatim record," but its meaning is clear. *Black's* defines "record on appeal," as "the history of the proceedings on the trial of the action below (with the pleadings, offers, objections to evidence, rulings of the court, exceptions, charge, etc.), in so far as the same appears in the record furnished to the appellate court in the paperbooks or other transcripts." *Black's Law Dictionary* 1274 (6th ed. 1990).[7] The Court has made it clear that a transcript of pre-trial, as well as trial, proceedings must be provided. *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967) (holding that state court must provide indigent defendant with his preliminary hearing transcript). Courts of Appeal have long understood its rulings. *See, e.g., United States v. Devlin*, 13 F.3d 1361,1365 (9th Cir. 1994) (holding that the state must provide an indigent defendant with a suppression hearing transcript for trial preparation purposes); *United States v. Vandivere*, 579 F.2d 1240, 1243 (10th Cir. 1978) (holding that "the presumption should be that indigent defendants in criminal cases are entitled to a transcript of any preliminary examination"); *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1978) (holding that reversal was required where the trial court refused to grant defendant's motion for a transcript of the first trial and the preliminary examination).[8]

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7. As we explain later, appeals are different from second or successive trials in that appeals ordinarily involve only the specific issues the defendant chooses to raise; accordingly, only the portions of the transcript that are relevant to those specific issues must be provided in the particular case.

8. Our dissenting colleague cites to *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988), for his suggestion that the *Britt* principle is ambiguous as it relates to a defendant's right to a transcript of proceedings of a prior mistrial. Dissent at 11405. He fails to report, however, that in *Kirk* there was no dispute that the defendant was entitled to the full transcript of proceedings from his prior trial in which the jury had hung. In fact, the district court in that case granted him such a transcript "in full." *Kirk*, 844

[3] Moreover, limiting the right to a transcript of a prior mistrial to the receipt of the transcript of witnesses' testimony would be contrary to the Court's reasons for requiring the state courts to provide such transcripts. In *Griffin* and its progeny, the Court made it clear that the provision of a full transcript was necessary to ensure that indigent defendants have the same opportunity to effectively defend themselves against criminal charges as those with money to buy transcripts. *See, e.g.*, *Roberts*, 389 U.S. at 42 (1967) ("Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."). We doubt seriously that a wealthy defendant would ordinarily proceed in a subsequent trial without purchasing a full transcript of the proceedings, including, but not limited to, the parties' motions and the court rulings thereon and the opening statements and closing arguments. *Britt*, 404 U.S. at 437-38 (Douglas, J., dissenting) (stating that "wealthier defendants tend to purchase transcripts as a matter of course"); *Martin v. Rose*, 525 F.2d 111, 113 (6th Cir. 1975) ("[W]e can

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F.2d at 662. Our statement regarding ambiguity in the application of *Britt* related only to the unique question of the obligation to provide a transcript of a trial in which the defendant had been severed as a co-defendant after two weeks. *Id.*

Our precedent, which we recognize is only persuasive authority, has established that preliminary proceedings must be provided not only to indigent defendants whose trials ended in a mistrial, but more generally to indigent defendants preparing for a first trial. Thus, in *United States v. Devlin*, 13 F.3d 1361 (9th Cir. 1994), citing *Britt*, we held that "neither fairness nor efficiency supported imposing a preliminary requirement that [the defendant] prove he had a particular need for a transcript" of a suppression hearing. *Id.* at 1365. We further stated that "courts should . . . routinely grant indigent defendants' timely requests for free transcripts of significant prior proceedings, unless a substantially equivalent alternative device is available." *Id.* Because the Government had failed to establish that a practicable alternative to the transcript existed, we found error.

think of no more valuable document for defense counsel approaching a contested trial than the record of the previous trial of his client for the exact same crime with which he is charged again before the court of another sovereign. We cannot conceive of a competent lawyer for an affluent client who would not order a trial transcript under such circumstances.").

[4] Portions of the transcript, other than the testimony of witnesses, are often crucial to the preparation of an effective defense. Opening and closing arguments may provide valuable insight into the government's strategy; motions to suppress or exclude often reveal, as here, information regarding damaging and prejudicial evidence that the state plans to introduce, and the rulings thereon may sometimes be case-dispositive. *Cf. United States v. Ash*, 413 U.S. 300, 310-311 (1973) (stating that the result of "critical confrontations" of the accused by the prosecution at "pretrial proceedings" might well "settle the accused's fate and reduce the trial itself to a mere formality") (*quoting United States v. Wade*, 388 U.S. 218, 224 (1967)). The state's contention that such portions of the proceedings need not be furnished to indigent defendants cannot be reconciled with the Court's stated purpose in establishing the right to a transcript of prior proceedings, to ensure that the defendant can prepare an "effective defense," or with its mandate that poor defendants have the same access to transcripts and other basic materials as the wealthy. *See Britt*, 404 U.S. at 227.

[5] We conclude that the Court's cases clearly establish that an indigent defendant must be provided with a transcript of prior proceedings which includes, among other things, motions and the court's rulings thereon, as well as opening statements, closing arguments, jury instructions, and relevant colloquies.[9]

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9. The dissent states that "at least one court" has reached a decision that Supreme Court law does not extend to providing a full transcript of prior proceedings after a mistrial and, from that, we should reach the

California law is similar. In its decision, the California Court of Appeal conceded that under California Supreme Court precedent the trial judge erred in failing to provide Kennedy with the full transcript of prior proceedings. The Court of Appeal stated that the trial court "should have provided" the "additional portions of the transcript" requested by Kennedy.

[6] Therefore, the Court of Appeal did not contend, as the state does here, that either Supreme Court or California case law provides indigent defendants with the right to witnesses' testimony only. Rather, the Court of Appeal held that the trial judge's failure to provide the indigent defendant with a full transcript of all proceedings did not require reversal because of the doctrine of "substantial compliance." Established Supreme Court law, however, does not provide a "substantial compliance" exception to the requirement that state courts

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conclusion that the law is not clearly established. For support, the dissent cites a single unpublished memorandum in which the Fourth Circuit summarily dismissed an appeal from the lower court's decision. Dissent at 11405. Outside of providing questionable precedential authority, the lower court's decision is inapplicable here. The case involved a defendant's request for portions of a transcript of prior proceedings for use *on appeal*. *See Williams v. Leeke*, 444 F. Supp. 229, 232 (D.S.C. 1976). As we discuss later, the Supreme Court has, understandably, set forth different principles for determining when due process requires the state to furnish a defendant with a full transcript on appeal. *See* discussion at 7861-62 Regardless, the Supreme Court has already debunked the dissent's formulation of AEDPA's requirements, stating that "the federal habeas court should not transform the inquiry into a subjective one by resting its determination on the simple fact that *at least one of the Nation's jurists* has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000) (emphasis added). The mere existence of conflicting authority does not mean that Federal law is not clearly established. *Id.* That the dissent misconceives the law on this point should be self-evident: If one decision reaching a different result were enough to destabilize Supreme Court precedent, then, it is not an exaggeration to suggest that no Federal law would ever be clearly established.

provide a transcript of prior proceedings to indigent defendants facing a subsequent trial. Under *Britt*, it is assumed that a defendant will "ordinarily" need a complete transcript of a prior mistrial in order to present an effective defense. *Britt,* 404 U.S. at 228[10/] (declaring the transcript of a prior mistrial to be valuable to the defendant both as a discovery device in preparation for the next trial and as a tool at the trial itself for the impeachment of witnesses); *see also Roberts*, 389 U.S. at 43-44 (finding it unnecessary to discuss the importance of a preliminary hearing transcript to the defendant and holding that the transcript must be granted notwithstanding the dissent's argument that the petitioner had suggested no use to which the transcript could be put).

The state contends that *Mayer* has created an exception, similar to "substantial compliance," to the *Britt* rule that a defendant must be provided a complete transcript in order to prepare for a subsequent trial. The state's reliance on *Mayer* is in error; the exception delineated there is not applicable in the case of *second or successive trials*. *Mayer* addressed the issue whether the state must provide a defendant with a full verbatim record for use *on appeal*. The Court held that because an appellant's challenges to his conviction or sentence are limited to the specific issues raised by him in the appellate court (such as, for example, "the validity of the statute or the sufficiency of the indictment upon which conviction was predicated"), the state may show that the complete record contains extraneous material that it need not provide because it is irrelevant to the issues before the appellate court. *Mayer*, 404 U.S. at 194. Thus, on appeal, where the state meets its burden, it may provide an indigent defendant with "a record of sufficient completeness" – the record that is relevant to the issues raised

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10. The Court stated that serious doubts about a decision denying a request for a full transcript would arise "if it rested on petitioner's failure to specify how the transcript might have been useful to him." *Id.*

– rather than a complete transcript, because "part or all of the stenographic transcript . . . [is not] germane to the consideration of the appeal." *Id.* at 194-95. Because all of the proceedings from a first trial are ordinarily germane to a second trial (at least in the absence of a dismissal of some of the initial charges), the record of "sufficient completeness" exception is inapplicable. The Supreme Court acknowledged this when it failed to incorporate similar language regarding a "record of sufficient completeness" in its *Britt* opinion – an opinion filed the same day as *Mayer*.[11]

The Court has recognized only one exception to the *Britt* requirement in the case of a second or successive trial. In *Britt*, the Court said that the state may provide an indigent defendant with an alternative device that would fulfill the same functions as a court-prepared transcript, but only after meeting its burden of establishing that the proposed alternative is sufficient. *Britt*, 404 U.S. at 230 (stating that the defendant does *not* "bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight."). The state does not contend that this exception is applicable here.[12]

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11. Even in *Mayer*, the Court made clear that the general rule remained the same. The Court stated that a full transcript must still be provided whenever it "is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." 404 U.S. at 195. For example, a complete record may be necessary to enable a lawyer to determine what issues should be raised on appeal.

12. The Supreme Court has suggested that where, as here, "a transcript is available and could easily have been furnished," no alternatives proposed by the state will suffice. *Long*, 385 U.S. at 194-95. Since *Britt*, the Court has never approved an alternative to the provision of a complete transcript. The Eleventh Circuit has, however, allowed the state to provide a partial transcript in a case in which defendant's attorneys in the second trial had also represented him during the earlier mistrial and had "access to and took advantage of adequate alternatives or substitutes for the requested transcripts." *Lindsey v. Smith*, 820 F.2d 1137, 1147 n.14 (11th Cir. 1987).

Our dissenting colleague contends that there is another exception to *Britt* in addition to the "narrow" exception discussed here. *Id.* at 227. He states that a free transcript need not be provided if it is not "necessary to an effective defense," and that for a "transcript to truly be 'necessary to an effective defense' " it need be more than "merely helpful." Dissent at 11408. He would then put the burden on the defendant to prove that there is a "need" for the transcript. The dissent's attempt to create a second exception conflicts directly with *Britt*. In *Britt*, the Supreme Court stated that a decision to deny a petitioner a transcript which rested on the "petitioner's failure to specify how the transcript might have been useful to him" would be constitutionally suspect. *Id.* at 228. It emphasized that its "cases ha[d] *consistently recognized* the value to a defendant of a transcript of prior proceedings, *without requiring a showing of need.*" *Id.* (emphasis added). In this regard, the Court cited *Roberts v. LaVallee,* in which it had granted the writ and concluded that, despite the fact that the petitioner had pointed to "*no use* to which the [preliminary hearing] transcript could have been put," the state was required to provide it. *Id.* at 228 n.3 (emphasis added). Like the California Court of Appeal, our dissenting colleague would have us abrogate clearly established Supreme Court law. This we are not free to do.

IV

Having identified clearly established Supreme Court law, we must next decide whether the California Court of Appeal's

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Contrary to the dissent's representation, the Eleventh Circuit did not "suggest" in *Lindsey* that where a defendant had access to only portions of a transcript the constitutional mandate was satisfied. *Phegley v. Greer*, 691 F.2d 306 (7th Cir. 1982), cited for the same proposition, is also inapplicable. *Id.* at 309. The Seventh Circuit held only that where the state routinely does not transcribe preliminary hearings, alternatives to a transcript – such as the presence of trial counsel at the hearing – may suffice under the *Britt* exception (which is not applicable here, *see* text *supra*).

decision is contrary to or an unreasonable application of that law. When determining whether a decision is either "contrary to" or an "unreasonable application" of AEDPA, the habeas court must examine the last reasoned decision by the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-02 (1991). In this case, the California Supreme Court summarily denied review of Kennedy's claim, so the last reasoned state court decision is the California Court of Appeal decision on direct appeal.

[7] In reaching its decision, the Court of Appeal relied on *People v. Hosner*, 15 Cal.3d 60 (1975), which adopted, in sum and substance, the applicable Supreme Court precedents, including *Britt*, and which held that "an indigent defendant in a criminal trial who was entitled to a free transcript of a prior mistrial was *presumptively* entitled to a *full* transcript of those prior proceedings." *Id.* at 70 (citing *Britt*, 404 US. at 227) (emphasis in original). As discussed, applying *Hosner*, the California Court of Appeal concluded that the trial court should have provided Kennedy with a full transcript. If the Court had stopped its analysis here, the determination on the merits would *not* have been contrary to clearly established Supreme Court law.

[8] The California Court of Appeal, however, went on to reject Kennedy's constitutional claim on the basis that in providing Kennedy with only a transcript "of the [trial] testimony, the [trial] court substantially complied" with *Hosner*. In so doing, the state court added an additional factor to the Supreme Court rule, and thus its decision was contrary to clearly established Supreme Court law. The alteration of the existing Supreme Court requirements through the addition of the "substantial compliance" doctrine contravened controlling precedent, which requires the state to provide an indigent defendant with a full transcript of the prior proceedings for use in a subsequent trial. *Britt,* 404 U.S. at 227. In sum, because the California Court of Appeal created a new and additional

"substantial compliance" exception to the governing Supreme Court rule, and thereby altered or amended the well-established Supreme Court requirement that indigent defendants be provided with a complete transcript of the "prior proceedings," we hold that the state court's decision was contrary to clearly established law. *See Williams v. Taylor*, 529 U.S. 362, 393, 397 (2000) (holding that where the State Supreme Court "mischaracterized at best" the governing rule and read a "separate inquiry" into the established Supreme Court *Strickland* ineffective assistance standard, the writ must be granted); *Benn v. Lambert*, 283 F.3d 1040, 1051, n.5 (9th Cir. 2002) ("The addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law under the 'contrary to' clause of AEDPA.").[13/]

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13. Were we to conclude that the state court's determination was not contrary to clearly established Supreme Court precedent because we believed that the application of a substantial compliance test does not add an additional factor to the controlling Supreme Court standard, we would be compelled to conclude that the California Court of Appeal decision constitutes an objectively unreasonable application of clearly established Supreme Court law. *See Williams*, 529 U.S. at 409. To approve the omission of transcripts of critical portions of the proceedings, such as the opening statements and closing arguments, and the motions, hearings and rulings relating to the suppression or exclusion of prejudicial evidence, would constitute an objectively unreasonable application of *Britt* and the related cases, first, because the material omitted, especially the motion and ruling regarding "gang" evidence and the opening and closing arguments, pertained to important aspects of the proceedings, *Roberts*, 389 U.S. at 41 (holding that defendant must be provided with preliminary hearing transcript at which "major state witnesses" testified), and, second, because the prosecution failed to carry its burden of justifying such omissions. *See Gardner*, 393 U.S. at 370 (holding in favor of indigent defendant who requested a transcript of his habeas corpus proceedings and stating that the state failed to show the existence of an adequate substitute for a full transcript); *Eskridge v. Washington Bd. of Prison Terms and Paroles*, 357 U.S. 214, 215-16 (1958) (per curiam) (holding in favor of indigent defendant and stating that the state failed to show availability of trial notes to substitute for a full transcript); *Hosner*, 15 Cal.3d at 66 (holding that the

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Where the state completely fails to provide an indigent defendant with a transcript of a mistrial for use in connection with a second trial, we would likely find a structural error, requiring automatic reversal. *See Turner v. Malley*, 613 F.2d 264, 266 (10th Cir. 1979) (holding that *Britt* requires automatic reversal where the state fails entirely to provide the defendant with a transcript for use at the second trial and also fails to show the existence of an alternative device that would fulfill the same functions as the transcript); *Martin*, 525 F.2d at 113 (same); *United States v. Pulido*, 879 F.2d 1255, 1257 (5th Cir. 1989) (same); *United States v. Talbert*, 706 F.2d 464, 470 (4th Cir. 1983) (same); *see also Roberts*, 389 U.S. at 43 (reversing the state conviction, granting the writ, and failing to adopt the dissent's suggestion that a separate harm-less error analysis should be conducted where the state failed to provide the indigent defendant with a transcript of a preliminary hearing for use at trial). Where the state fails to provide only a portion of the transcript, however, we conclude that harmless error analysis applies. *Cf. United States v. Devlin*, 13 F.3d 1361, 1364-65 (9th Cir. 1994) (applying harmless error where the trial court failed to provide the defendant with a transcript of a suppression hearing conducted prior to trial); *United States v. Rosales-Lopez*, 617 F.2d 1349, 1355 (9th Cir. 1980) (same). We note, however, that where significant and crucial portions of the proceedings of a first trial are omitted, it will generally be prejudicial to an indigent defendant's ability to prepare an effective defense. *See, e.g., Roberts*, 389 U.S. at 43 (holding that the failure to provide defendant with preliminary hearing transcript at which key state witnesses testified was

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state must overcome the presumption that the defendant is entitled to a complete transcript of the prior trial and meet its burden of showing that an adequate substitute is available at the hearing in the trial court in which the transcript is requested).

constitutional error requiring reversal). The more significant and crucial the portions of the proceedings omitted, the more likely that we will be compelled to conclude that the defendant was deprived of the "basic tools of an adequate defense."[14] *Britt*, 404 U.S. at 227.

In making a harmless error determination in a habeas case, "normally a record review will permit a judge to make up his or her mind about the matter. And indeed a judge has an obligation to do so." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). When reviewing a state court decision to determine "whether the error had a substantial and injurious influence or effect on the verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993), a judge should "ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' " *O'Neal*, 513 U.S. at 436-37. Further, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had a substantial and injurious effect or influence on the jury's verdict, that error is not harmless. And, the petitioner must win." *Id.* at 436 (quotations omitted). These principles apply in post-AEDPA as well as pre-AEDPA cases. *Early v. Packer*, 537 U.S. 3, 10 (2003); *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

[10] Upon review of the record, we conclude that the state court's denial of a complete transcript of prior proceedings had a substantial and injurious effect on the jury's verdict.[15] *Brecht*,

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14. At the other end of the spectrum, we would be unlikely to find that a failure to provide insignificant and inconsequential portions of the proceedings would result in reversible error.

15. The dissent would have us forfeit petitioner's constitutional claim on the ground that counsel we appointed on appeal failed to argue adequately the prejudicial effect of the state's constitutional failure to provide the portions of the transcript that it omitted. Our dissenting colleague does not deny that the question of prejudice was presented adequately throughout the state court proceedings and even in the district

court where the petitioner represented himself. The issue of course pertains to the prosecution's failure to provide the portion of the transcript relating to its first effort to insert the gang membership issue into the trial in order to inflame the jury and prejudice it against petitioner.

In the state court of appeals, defense counsel argued in his brief that "prejudice from the lack of a complete transcript is demonstrated by the fact defense counsel was obviously unaware of [the prior judge's] ruling during the first trial that the prosecution witnesses were not to refer in any way to appellant's gang membership. As a result on retrial, defense counsel failed to secure a ruling prohibiting the prosecution from [testifying to] gang membership and terminology in front of the jury." Counsel also asserted that "during the first trial, without the inflammatory evidence, the People were unable to persuade the jury of appellant's guilt. By introducing irrelevant and unduly prejudicial evidence, the prosecution essentially assured the trial jury would be inflamed against appellant and convict him." The Court of Appeal opinion considered and ruled on this contention.

Similarly, in the district court, Kennedy, proceeding *pro se*, objected to the magistrate judge's findings and recommendations arguing that a transcript of the first trial would have aided defense counsel by alerting him to make a motion to exclude the gang evidence. He further asserted that the introduction of such evidence was prejudicial and inflammatory. Despite these objections, the district judge upheld the findings and recommendations and certified both the question of whether Kennedy's "right" had been violated as a result of the failure to provide the requested portions of the full transcript and whether the error was harmless.

In his brief to this court, court-appointed counsel argued that the failure to provide the omitted portions of the transcript constituted structural error. The state disagreed. Both parties, however, proceeded at all times from the factual basis provided by the record, i.e., that the material requested by Kennedy and omitted by the state related to gang member-ship and the suppression hearing in that regard (as well as the opening and closing statements). Because we rejected petitioner's structural error argument, the question we must necessarily answer once a constitutional violation is found is whether the error was harmless. We are obligated to conduct that review on the basis of the "record as a whole." *See Brecht*, 507 U.S. at 638; *Murtishaw v. Woodford*, 255 F.3d 926, 973 (9th Cir. 2001) (stating that the inquiry is whether "in light of the record as a whole," the error had a substantial and injurious effect or influence in determining the verdict and conducting a review of the record before granting the petition); *see also Bartlett v. Alameida*, ___ F.3d ___1020, 2004 WL 1043351(9th Cir. 2004) (conducting harmless error review under *Brecht* based on record presented

507 U.S. at 627. The prosecution took advantage of Kennedy's counsel's lack of knowledge regarding the prior trial court order prohibiting gang testimony in order to introduce the prejudicial testimony in the second trial; the state conceded as much during oral argument. The transcript of the trial testimony provided to the defense was devoid of any mention of gang involvement, gang language, or of a witness who would testify to the connection between the two. However, had Kennedy's counsel had access to the missing portions of the transcript of the proceedings – which portions included the discussions regarding the introduction of gang related evidence, the motion to exclude, and the judge's favorable ruling thereon – we have little doubt that Kennedy's counsel in the second trial would have presented a similar motion with a substantial likelihood of success.[16]

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in habeas case); *Taylor v. Maddox*, ___ F.3d ___, 2004 WL 1043343 (9th Cir. 2004) (stating that under *Brecht* the court "must review the evidence at trial" to determine whether on habeas the constitutional error was harmless); *Jackson v. Giurbino*, 364 F.3d 1002, 1010 (9th Cir. 2004) (conducting harmless error review under *Brecht* based on record presented in habeas case); *cf. United States v. Galindo*, 913 F.2d 777, 779 (9th Cir. 1990) (stating that after conducting "a careful review of the record in this case," the error was harmless).

It is helpful when counsel we appoint are familiar with the record and capable of aiding us in our review. That is, unfortunately, not always the case. Nevertheless counsel's failure does not relieve us of our obligation to determine whether the constitutional error that petitioner has established warrants relief. However, wholly aside from that obligation, we may review an issue that is not properly raised, if the failure to raise it does not prejudice the opposing party. *See, e.g., United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). Here, neither the state nor our dissenting colleague could have been surpri sed that the question whether the state's failure to provide the transcript was harmless consisted of the identical question that had been litigated in the state and federal courts throughout the proceedings, i.e. the omission of the suppression hearing relating to the gang membership testimony. Nor could anyone have been prejudiced in any way by defense counsel's failure to address the prejudice question more directly.

16. Had new counsel had access to the pretrial proceedings, he would undoubtedly have based a motion to exclude on the arguments already

After hearing arguments from counsel, the first trial judge made a determination that the introduction of evidence tending to show gang affiliation on the part of Kennedy would be highly prejudicial. The case law in this circuit provides ample support for that conclusion and for the conclusion that the failure to provide Kennedy with the portion of the transcript relating to that evidentiary issue, and the consequent introduction in the second trial of the gang related evidence, was prejudicial. Our cases make it clear that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error. Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability. *See Mitchell v. Prunty*, 107 F.3d 1337, 1342-43 (9th Cir. 1997), *cert. denied*, 522 U.S. 913 (1997) (reversing the conviction and holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an "evil person," that is not enough to make him guilty under California law), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242, 1248 (9th Cir. 1998); *see also United States v. Garcia*, 151 F.3d 1243, 1244-46 (9th Cir. 1998) (reversing the conviction and stating that it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members). In this regard, we have stated that testimony regarding gang membership "creates a risk that the jury will [probably] equate gang membership with the charged crimes." *United States v. Hankey*, 203 F.3d 1160, 1170 (9th Cir. 2000) (internal quotations and citations omitted). We further stated that where, as here, "gang" evidence is proffered

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presented and on the prior judge's ruling in favor of the defendant. Had he done so, it is reasonable to believe the second trial court would have agreed that there should be no reference to " 'gangs or gang affiliation' unless cleared by the court out of the presence of the jury" given the highly prejudicial nature of gang testimony, notwithstanding that the second court would not have been bound to do so under the "law of the case" doctrine. *See* 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1997).

to prove a substantive element of the crime (and not for impeachment purposes), it would likely be "unduly prejudicial." *Id.* In sum, the use of gang membership evidence to imply "guilt by association" is impermissible and prejudicial. *Garcia*, 151 F.3d at 1246.

Here, the prosecution, well aware that the first trial court had forbidden the introduction of testimony relating to gang involvement or association in order to establish defendant's guilt, deliberately elicited testimony from Detective McDowell for this purpose.[17/] We conclude that the jurors in Kennedy's case most likely drew impermissible inferences from Detective McDowell's testimony, equating Kennedy's purported gang membership with the charged crime. The fact that the first trial ended in a hung jury and that, following a one day trial, the jury in the second trial deliberated for three days before reaching a verdict, also supports our determination that the refusal to provide Kennedy with a complete transcript had a substantial and injurious effect on the jury's decision.[18/] In sum, had a

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17. Because the jury during its three-day long deliberation, asked that the court reporter read Detective McDowell's testimony back to them, the jurors heard the impermissible evidence of gang affiliation twice.

18. From the fact that the first trial ended in a mistrial, as well as the fact that the jury deliberated for a considerable amount of time in the second trial, we infer that the question as to Kennedy's guilt or innocence was a close one in both trials. That the jury did not find the evidence in the case against Kennedy overwhelming in either the first or second trial makes it even more difficult to draw the conclusion that prejudicial gang testimony, which the jury heard on two separate occasions in the second trial (once during trial and once during its deliberations), was not a substantial factor that tipped the scales against the defendant the second time. *See Murtishaw v. Woodford*, 255 F.3d 926, 974 (9th Cir. 2001) (granting the writ because "given the mitigating evidence presented, the jury's apparent interest in it, and the length of the jury's deliberations, [the court was] in 'grave doubt' about whether the jury would have returned a death sentence"); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (stating that "longer jury deliberations 'weigh against a finding of harmless

transcript containing the missing portions of the proceedings, including the motion to exclude gang related testimony and the court's favorable ruling thereon, been furnished to the defense, it would have served as precisely the type of "discovery device in preparation for [the second] trial" that *Britt* referred to when explaining why it is necessary to provide the defense with a transcript of the proceedings.[19/] 404 U.S. at 228.

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error [because] lengthy deliberations suggest a difficult case" and holding that admission of possibly prejudicial evidence required reversal of defendant's conviction where the four-day jury deliberations were "relatively lengthy" for a two-count drug case) (internal citations omitted); *United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer jury deliberations "weigh against a finding of harmless error [because] lengthy deliberations suggest a difficult case"); *Dallago v. United States*, 427 F.2d 546, 559 (D.C. Cir. 1969) ("The jury deliberated for five days, and one would expect that if the evidence of guilt was over-whelming the jury would have succumbed much sooner").

19. The dissent's argument that defense counsel's failure to object after the jury heard the gang testimony breaks the "chain of causation," Dissent at 11418, is based on a faulty premise, namely that an objection would have eliminated the prejudicial testimony from the record or, at the least, from the jurors' memories. Neither assumption is correct. *Cf. Thompson v. Borg*, 74 F.3d 1571, 1581 (9th Cir. 1996) (stating that timely instruction does not cure prejudicial impact of evidence if information is highly prejudicial); *Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988) (stating that where statements concern a defendant's prior criminal behavior, the efficacy of jury instructions is subject to serious doubt); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986) ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities"); *see also Bruton v. United States*, 391 U.S. 123, 126 (1968) ("The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (Jackson, J., concurring). It is likely that counsel concluded that an objection to testimony suggesting petitioner's gang membership would

[11] We note that the prejudice in this case stemmed not only from the failure to provide Kennedy with the portion of the proceedings relating to the exclusion of gang related evidence, but also from the omission of other portions of the transcript. We consider at this point only the opening statements and the closing arguments from the first trial. The statements and arguments, which Kennedy explicitly requested but was denied, were also crucial to the development of an effective defense. Various tactical and strategic decisions made by Kennedy's new counsel might have been affected had he been provided with a copy of the prosecutor's opening statement and closing argument; he might, for example, have been able to anticipate some of the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight that the prosecution would place on various items of evidence, and better determine what would be needed to refute them. As the California Supreme Court itself has explained, as "in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." *Hosner*, 15 Cal.3d at 70. In hindsight, it is difficult to conclude that the omitted portions of the transcript would not have been important to Kennedy in preparing an

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have made matters worse by calling further attention to the prejudicial disclosure. This is particularly so because defense counsel was unprepared to present an effective argument for inadmissibility having, as a result of the constitutional violation, been entirely surprised by the prosecutor's questioning and the witness's response. Moreover, it is pure speculation at this point as to whether any admonition would have been adequate to cure the prejudice to the defendant. *Thompson*, 74 F.3d at 1581; *see also Lewis*, 787 F.2d at 1323 (reversing where prosecution's evidence against the defendant was "weak" and jury instructions were inadequate to cure doubts regarding the prejudicial effect of evidence admitted and prosecutor's statements).

effective defense, particularly where, as here, the prosecution had a distinct advantage in presenting the government's case, having knowledge of all that occurred during the course of the first trial. *See Devlin*, 13 F.3d at 1364 (stating that the transcript should have been provided to "place[ ] the defendant on equal footing with the prosecution"). For these reasons, we hold that denying Kennedy a full transcript of the proceedings for use in relation to his second trial was not harmless error.[20/]

We REVERSE the district court's denial of the petition for writ of habeas corpus and REMAND the matter for issuance of the writ.

FISHER, Circuit Judge, concurring:

I fully concur in the majority opinion, but want to respond specifically to the dissent's suggestion that our conclusion that there was prejudice results from "lawyering from the bench."

The dissent seems to forget that this habeas appeal arises from a criminal case in which the constitutional right of the

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20. The same prosecutorial office conducted the first and second trial, although the lead prosecutor in the two trials was different. Such a change does not affect the analysis of the underlying prosecutorial conduct. *See, e.g.*, *Thigpen v. Roberts*, 468 U.S. 27 (1984) (explaining, in the context of prosecutorial vindictiveness, that a change in prosecutors does not defeat a presumption of vindictiveness); *Santobello v. New York*, 404 U.S. 257 (1971) (holding, in the plea bargaining context, that "staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done"); *c.f. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding, in the *Brady* context, that an "individual prosecutor has a duty to learn of any favorable evidence known to others . . . ."). Moreover, there is evidence in the record that the first and second prosecutors actually cooperated in matters relating to the second trial. For example, the first prosecutor made appearances at preliminary proceedings involving the second trial and apparently participated in the handling of some of Kennedy's new counsel's discovery requests.

defendant to a fair trial is the issue, not just "litigation" in which someone wins or loses according to his lawyer's skill, or lack of it. As such, the court's pursuit of the issue of prejudice with the state's attorney – charged with upholding the fairness of the criminal justice system in the course of prosecuting defendants – was not lawyering; it was judging.

> Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may – indeed, must – do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. As Justice Douglas once warned, "the function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993).

The issue of prejudice was not some hidden, esoteric legal point the parties or the court was unaware of – indeed, the trial judge in the first trial had addressed the highly prejudicial nature of "gang" testimony and precluded the very kind of questioning the state introduced at the second trial. Even had there been no oral argument in this case, the record and written arguments before the court were quite sufficient for us to evaluate the issue of prejudice and any question of waiver. Oral argument – as this court routinely makes clear to counsel – is an opportunity for the court to ask questions, often to give counsel a chance to address a particuiar judge's tentative conclusions to clarify or even persuade the judge to change his or her mind. Thus the notion that because defendant's appointed counsel could not –

for whatever reason – identify one fairly obvious instance of possible prejudice (one the initial state trial judge recognized and made part of the record) "should have ended this matter" is just wrong, if by that the dissent means we as judges must have turned a blind eye to the record and common sense.

As Judge Posner put it – himself borrowing from a lawyer's famous observation – "Judges, by the way, are not wallflowers or potted plants." *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988). Or as another of his colleagues observed: "While a judge should never engage in advocacy from the bench, he or she has an obligation to raise legal issues that the parties have overlooked or neglected.... The judge should take an active role, when necessary, to ensure fairness and to conform the proceedings to the law." *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996). The questions posed to counsel, and the majority opinion which I join, are in furtherance of that proper judicial role.

O'SCANNLAIN, Circuit Judge, dissenting:

This case represents a triumph of lawyering from the bench. While I share some of the court's evident sympathy for the defendant – whose third strike resulted from the sale of less than one-tenth of one gram of a *legal* substance to an undercover officer[1/] –I respectfully dissent from its decision to step into

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1. Pursuant to California Health and Safety Code § 11355, "Every person who . . . offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any . . . liquid, substance, or material in lieu of a controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison." As a "wobbler" – an offense that can be punished as either a felony or misdemeanor, *see Lockyer v. Andrade*, 538 U.S. 63, 67 (2003) – sale of a substance in lieu of a controlled substance can (as in this case) lead a recidivist to be sentenced to twenty-five years to life under California's Three Strikes Law, Cal. Penal Code §§ 667(e) & 1170.12(c)(2).

counsel's shoes and tango its way around the deference we owe to state courts as coordinate expositors of federal law.

I

There is no dispute that Kennedy was entitled to some portion of the transcript from his first trial on these charges. *See generally Britt v. North Carolina*, 404 U.S. 226 (1971). The only issue before the court is whether *clearly established* Supreme Court precedent requires the State to have provided him with a complete transcript, *including opening and closing arguments and a recounting of any preliminary trial motions*. The majority cites no Supreme Court case that extends *Britt* beyond a requirement that a transcript of all *testimonial* evidence adduced in prior proceedings be made available to indigent defendants; it finds its clearly established Supreme Court precedent not in the *U.S. Reports*, but in *Black's Law Dictionary*. Opinion at 11380-81, 11382.

If this were a direct criminal appeal, I might not necessarily disagree with the court's interpretation of *Britt*. But on collateral review, our job is not to divine the *best* interpretation of an admittedly *vague* Supreme Court precedent, *see United States v. Kirk*, 844 F.2d 660, 662 (9th Cir. 1988) ("The right to free transcripts is not absolute. The Court in *Britt* recognized that the 'outer limits of that principle are not clear.' ") (quoting *Britt*, 404 U.S. at 227)),[2/] but to determine whether the state

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Kennedy's prior offenses included disorderly conduct, theft, burglary, battery, and forcible rape; numerous parole violations followed his nine-year incarceration in state prison for the latter offense. *Cf. Ramirez v. Castro*, 365 F.3d 755, 767-69 (9th Cir. 2004) (declaring unconstitutional the imposition of a three-strikes twenty-five-to-life sentence on a recidivist whose prior history consisted only of three non-violent shoplifting offenses and who previously had served just six months and 20 days in county jail).

2. The majority suggests that *Kirk*'s reference to *Britt*'s *own* recognition of its ambiguity is limited to the facts of *Kirk*. Opinion at 11383

court's result in this case reflected an *objectively reasonable* interpretation of an unmistakably *clear* Supreme Court decision. At least one court has held that the relevant Supreme Court case law does not extend so far as the majority would take it, and given our acknowledgment of *Britt*'s fuzzy contours, I have difficulty concluding that the state court's decision unreasonably interpreted clearly established federal law within the meaning of AEDPA. *See Williams v. Leeke*, 444 F. Supp. 229, 232 (D.S.C. 1976), *aff'd per unpublished memorandum* 571 F.2d 579 (4th Cir. 1978) ("The authorities cited by petitioners to support their contention that the Constitution requires them to obtain a transcript of closing arguments do not recognize such a requirement. A transcript of arguments to a jury is omitted from the requirements set out in *Hardy v. United States*, 375 U.S. 277 (1964), and *Britt v. North Carolina*, 404 U.S. 226 (1971), and *Herring v. New York*, 422 U.S. 853 (1975), make no reference to the reduction of argument to the jury into transcript form.") (citations edited); *see also Price v. Vincent*, 538 U.S. 634, 643 (2003) ("This was not an *objectively unreasonable* application of clearly established law as defined by this Court.

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n.8. Aside from the weakness of such a proposition, I note that while *Kirk* surely addressed a distinguishable factual scenario, no fair reading of the quoted passage – which opened the court's analysis of *Britt* and its progeny – supports such a limited interpretation. For the sake of ease, I here quote the *Kirk* passage in full:

> The Supreme Court has held that a state 'must, as a matter of equal protection, provide indigent prisoners with the *basic tools of an adequate defense* or appeal, when those tools are available for a price to other prisoners.' *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 92 S. Ct. 431 (1971) (emphasis added). However, the right to free transcripts is not absolute. The Court in *Britt* recognized that the 'outer limits of that principle are not clear.' *Id.*

The Court, quite simply, has never clearly held that a transcript of pre-mistrial motions are "basic tools of an adequate defense" – that is, that they fall within the admittedly "not clear . . . outer limits" of its doctrine.

Indeed, numerous other courts have refused to find [constitutional] violations under similar circumstances.") (emphasis in original).

The court's castigation of the state tribunal for its creation of a "doctrine of 'substantial compliance' " presents a red her-ring. *See* Opinion at 11386. *Britt* itself fails to set forth a rigid requirement that defendants be provided with a transcript in every case, but rather establishes its own rule of substantial compliance – demanding delivery of a free transcript only when doing so "is necessary for an effective defense," *Britt*, 404 U.S. at 227, and failing to find a constitutional violation where a "substantially equivalent" device is available. *Id.* at 230. Read in the charitable light demanded by AEDPA, *see Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003) (noting AEDPA's demand that courts must "presume . . . that state courts know and follow the law and give state court decisions the benefit of the doubt.") (citation and quotations omitted), the state court's reference to "substantial compliance" hardly "created a new and additional . . . exception" to established Supreme Court doctrine. *Contra* Opinion at 11390. It simply represents the Court of Appeal's eminently reasonable conclusion that the partial transcript delivered to Kennedy satisfied *Britt*'s requirement that indigent defendants be given free access to only those portions of a transcript which are necessary to ground a constitutionally competent defense.

Indeed, the following two sentences of the Court of Appeal's opinion confirm that is precisely what was meant by its allusion to substantial compliance: "Kennedy was afforded a free transcript of all the testimony. He thus had available those crucial portions which might be necessary . . . for the purposes of impeaching witnesses and rebutting evidence." *Kennedy v. Terhune*, No. D027718 at 6 (Cal. Ct. App. filed Sep. 8, 1998). Nonetheless, the majority once again faults the state appellate court's reaching the same conclusion that at least one of our

sister circuits has suggested. *See Phegley v. Greer*, 691 F.2d 306, 309 (7th Cir. 1982) ("Due process does not always require the state to provide a full transcript to an indigent defendant *if a partial transcript* or appropriate substitute is made available.") (emphasis added), *cert. denied* 459 U.S. 946 (1982); *see also Lindsey v. Smith*, 820 F.2d 1137, 1148 (11th Cir. 1987), *cert. denied* 489 U.S. 1059 (1989) ("Moreover, in contrast to *Britt*, appellant's attorneys had access *to portions of the actual transcripts* of the first trial.").

The majority's only cogent critique of the Court of Appeal's conclusion that Kennedy had all he needed to prepare a constitutionally effective defense is its vague assertion that "motions to suppress or exclude often reveal, as here, information regarding damaging and prejudicial evidence that the state plans to introduce, and the rulings thereon may sometimes be case-dispositive." Opinion at 11384. But there are two serious problems with this conclusory reasoning. First, the majority utterly fails to explain why such evidence cannot be adequately and effectively dealt with by contemporaneous objection when it is encountered in the courtroom.[3/] For a

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3. The majority's suggestion that an objection would have been ineffectual because it may not have removed the prejudicial testimony from the jurors' minds, Opinion at 11397 n.19, not only contradicts case law establishing that jurors are generally presumed to follow the instructions of the court, *see, e.g.*, *United States v. Griffith*, 301 F.3d 880, 884 n.3 (8th Cir. 2002) ("The district court instructed the jury that the statements and comments of the prosecutor are not evidence. Because jurors are presumed to follow their instructions, this provides further evidence that Griffith suffered no prejudice as a result of the prosecutor's allegedly improper remarks.") (citation omitted); *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997) ("Within wide margins, the potential for prejudice stemming from improper testimony can be satisfactorily dispelled by appropriate curative instructions. Jurors are presumed to follow such instructions, except in extreme cases.") (citations, quotations, and alterations omitted); *United States v. Bullock*, 71 F.3d 171, 175 (5th Cir. 1995) ("[T]he court admonished the jury that it could consider Bullock's prior felony conviction only in

complete transcript truly to be "*necessary* to an effective defense," *Britt*, 404 U.S. at 227 (emphasis added), it must be more than merely *helpful*. *See Webster's Third New Int'l Dictionary* 1510-11 (1986) (defining necessary as "of, relating to, or having the character of something that is logically required . . . that cannot be done without; that must be done or had; absolutely required; essential, indispensable."); *cf.* Opinion at 11381 ("In asking this court to limit the meaning of 'prior proceedings' to a transcript of witness testimony, the state would have us construe the term so as to violate its ordinary and plain meaning. We are not free to do so."). At bottom, the majority offers only a thinly-reasoned justification to support its extension of precedent beyond that clearly established by the Supreme Court.[4/]

Second, the majority entirely overlooks the fact that–as a constitutional matter–the admission of prejudicial evidence generates reversible error only when it "renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183

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connection with the firearm count. Any possible prejudice could be cured with proper instructions and juries are presumed to follow their instructions. Therefore, the jury instructions were sufficient to cure any possible prejudice."), but also case law demonstrating precisely how effective objections and instructions can be. *See infra* at 7890 (collecting cases).

4. Contrary to the majority's assertion, I do not "put the burden on the defendant to prove that there is a 'need' for the transcript" tailored to the particular facts of his case. Opinion at 11388. That might indeed create tension with *Britt*'s holding that a trial court may not base its denial of a petitioner's request for a transcript on his failure to show "*particularized* need." *Britt*, 404 U.S. at 228 (emphasis added). Instead, I place the burden on the *majority* to justify *its* novel articulation of a thin rationale supporting the extension of prior precedent in order to impose a general requirement that indigents must be given a transcript of all non-testimonial preliminary proceedings; and to demonstrate that the state court objectively unreasonably concluded that, as a general matter, delivery of a partial transcript recording all testimony enables a constitutionally-effective defense.

(1986)). Thus, whatever value there may be in securing the exclusion of potentially prejudicial evidence from the courtroom prior to the commencement of trial, the fact that the courts subject the ultimate admission of prejudicial evidence to such a stringent standard of review evinces a constitutionalized conclusion that excluding such evidence by pre-trial motion is hardly necessary to securing a fair trial or guaranteeing a constitutionally effective defense. Otherwise, the courts long ago would have established a per se rule of ineffectiveness for failure to object to the admission of prejudicial statements at trial. Yet we have soundly rejected that proposition. *See, e.g.*, *Phyle v. Leapley*, 66 F.3d 154 (8th Cir. 1995) ("[Due to] the kinds of broad, highly subjective factors that trial lawyers must take into account as they make repeated, instantaneous decisions whether to object to a question, whether to move to strike a damaging unresponsive answer, or whether to move for a mistrial when a witness has delivered an unexpected low blow[,] [w]hen we review such trial decisions, the ineffective assistance standard is high – they are 'virtually unchallengeable' – in part because appellate judges cannot recreate from a cold transcript the courtroom dynamics that are an essential part of evaluating the effectiveness of counsel's performance.") (quoting 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* §§ 11.10, at 95 (1984)).

Viewed in this light, the state court's decision rejecting Kennedy's assertion of *Britt* error was neither contrary to, nor an unreasonable application of, clearly established federal law as set forth by the Supreme Court.

II

Even if it were objectively unreasonable for the state Court of Appeal to have concluded that a transcript of prior pretrial motions was not "needed for an effective defense"–which is was not–it was not objectively unreasonable for the Court of Appeal

to have concluded that any resulting constitutional error was harmless.

A

Notwithstanding more than twenty years of Ninth Circuit jurisprudence making clear that *Britt* errors are subject to harmless error review, *see, e.g.*, *United States v. Rosales-Lopez*, 617 F.2d 1349, 1355-56 (9th Cir. 1980), and despite the fact that the Certificate of Appealability issued by the district court directed Kennedy to address "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of Petitioner's rights *and whether it was harmless error*," petitioner's opening brief failed to allege that any prejudice stemmed from the trial court's refusal to provide him a complete transcript, asserting instead that no such showing was necessary. *See Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("Arguments not raised in opening brief are waived.").

Even after the state's responsive brief conclusively demonstrated that his claim was subject to harmlessness review, Kennedy did not suggest that he was in any way prejudiced until the final sentence of his reply brief. *See Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); *see also Sophanthavong v. Palmateer*, 365 F.3d 726, 737 (9th Cir. 2004) (noting the "obvious" prejudice wrought by allowing litigants to raise arguments for the first time in reply: doing so deprives opposing counsel of "the opportunity to point to the record to show that the new theory lacks legal or factual support").[5] Yet even then

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5. The majority's suggestion that no one could "have been prejudiced in any way by defense counsel's failure to address the prejudice question more directly," Opinion at 11394 n. 15, thus flatly contradicts our court's well-established–and just recently restated–understanding of how a

he was unable to identify any specific reason why counsel's lack of access to a complete transcript affected the out-come of his second trial. *Cf. United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989) ("The second reason that appellant's claim fails is that [he] has not pointed to any specific prejudice he has suffered from the alleged errors in the transcripts . . . . [Even assuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice.").

It is particularly curious that the majority seeks to escape Kennedy's waiver by pointing to the state's alleged factual concessions at oral argument. *See* Opinion at 11394. Let's have a look at what actually happened at the oral argument. Recognizing that we long have held *Britt* error subject to harmlessness review, the court had repeatedly prodded petitioner's counsel to identify some plausible instance of actual prejudice stemming from the trial court's failure to furnish his client a transcript of the pre-mistrial motions. The majority's final exchange with Kennedy's counsel during his opening argument is most illuminating:

> [Counsel for Kennedy]: . . . If the new counsel had had [a complete transcript], he would be much-better equipped.
>
> [Court]: Well, that's true. I mean, I think one can assume that the–more information is better than no information, or some information. So let's accept that premise. Is there anything you can point to that occurred in the second trial–there was a mistrial on the first one, right?
>
> [Counsel for Kennedy]: Yes.
>
> [Court]: Okay. So in the second trial, was there something that you can point to where it's clear that, had [petitioner]

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party's failure adequately to brief an issue prejudices the opposing party.

had the full trial transcript, he would have avoided some prejudicial episode?

[Counsel for Kennedy]: ***Not as I stand here.*** But I will say–

[Court]: Well then maybe you should sit down for a while, and on rebuttal maybe you can figure out your case.

That highlighted admission–following a ten second silence during which counsel searched in vain for some answer to the court's question–should have ended this matter. Aware that, beyond having waived it in the briefs, Kennedy's counsel had thus conceded the critical argument in this litigation, counsel for the State rose with the intention of only briefly addressing the court. In remarks lasting just 30 seconds, counsel noted that we long have held that *Britt* error is subject to harmless error review, and that petitioner had failed to identify any prejudice. The following exchange with the majority ensued:

[Counsel for the State]: Unless the court has any questions, I–I believe that there's . . .

[Court]: Yes. I have a question.

[Counsel for the State]: Yes, your honor.

[Court]: Umm. . . There was gang testimony at the second trial and not at the first. Right?

[Counsel for the State]: I believe that's correct, your honor.

[Court]: And at the first trial, the district court excluded references to his membership in a gang. Right?

[Counsel for the State]: I believe that is correct, your honor, yes.

[Court]: And that was done at a pre-trial hearing with a motion. And that part of the transcript was not furnished for the second trial. Right?

[Counsel for the State]: I believe that's correct, your honor.

[Court]: And, as a result, the lawyer was not aware of the issue, and didn't object. And the evidence was admitted. Right?

[Counsel for the State]: Yes, your honor.

[Court]: And we have a number of cases that establish how prejudicial the introduction of gang testimony is. Right?

[Counsel for the State]: Yes, your honor, depending on the nature and the circumstances of gang testimony that is introduced.

[Court]: Well, in this case, it was introduced gratuitously, by the deputy district attorney asking for an elaboration on what "cuz" meant. Right?

[Counsel for the State]: Yes, your honor, but I believe it was limited to the definition of what "cuz" meant, or could have meant.

[Court]: Well, what was it relevant to?

[Counsel for the State]: Umm. . . I–I believe it was, it may have been relevant to the area and the, the drug deal, the drug transaction.

[Court]: The fact that he was part of a gang. Right?

[Counsel for the State]: That's right.

[Court]: There's a minute order which was entered in the first case that said there will be no mention of gangs or gang affiliation unless clearly–unless cleared by the court out of the presence of the jury. That one came after the hearing on which it was made clear of the prejudicial nature of gang testimony. Did the same district attorney, deputy D.A. Clabby, try the second trial?

[Counsel for the State]: I am not sure.

[Court]: Well if the first judge thought it was prejudicial, why shouldn't we just assume, therefore, that prejudice is established in the second trial. Counsel (a) didn't know about the issue, didn't know about the prior ruling, and presumably the state did. And yet in the face of that prior minute order, the state went ahead and let its witness–in fact, invited its witness–to go ahead and inject the issue of gangs. Why isn't that sufficient to establish error? . . .

By the time the State's argument time had expired, Kennedy's counsel had been so embarrassed by the court's relentless interrogation of counsel for the State–and by its viscerally derisive display of frustration at the close of his opening argument– that he began his rebuttal with an offer of atonement:

[Counsel for Kennedy]: I apologize to the court for missing that clear argument about the gang testimony.

Now, I have nothing but the greatest respect for my panel colleagues' lawyerly acumen. But I do not find its exercise compatible with the basic obligations of the office we share. As judges, the essence of our role is restrained service as impartial

arbiters of disputes framed by litigants. It is not, I respectfully suggest, to act as backup counsel when litigants make poor arguments, or when they come into court without first having "figured out" their cases[6]–even when doing so is motivated by a well-intentioned, but unavoidably standard-less "philosophy of law . . . infused by concepts like . . . social justice."[7]

Indeed, it was just a few months ago that today's majority offered almost precisely that admonition. In proceedings arising out of a case we resolved following an oral argument held *the very same morning we heard this appeal*, an order signed by Judges Reinhardt and Fisher instructed: "Given the overwhelming volume of work which today confronts our courts, we do not generally favor requiring judges . . . to search out and

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6. The majority's novel assertion that the habeas petitioner himself need neither argue nor identify prejudice because we must gauge the existence of prejudice in light of the record as a whole merely begs the question. Opinion at 11393 n.15. For who could deny that *when* we assess prejudice we must do so based on the complete record, as opposed to a fragmentary image of proceedings below? The real question, which the majority fails to answer, is what triggers such an assessment *in the first instance*. I submit that–as with any other claim courts are called upon to address–we only assess prejudice once the petitioner argues that he has been harmed in some specific way by an alleged constitutional error. The majority simply confuses a statement of how we must analyze well-preserved claims of prejudice with the untenable conclusion that such arguments can never be waived.

7. Stephen Reinhardt and Howard Bashman, 20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, *available at* http://legalaffairs.org/howappealing/20q/2004_02_01_20q-appellateblog_archive.html (quotation marks omitted); *see also* Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, Keynote Speech at the University of St. Thomas Law Journal Symposium Honoring Judge John T. Noonan, Jr. (Oct. 18, 2003) ("Social justice is a substantive legal principle that pervades all aspects of the law from torts to Social Security claims. The purpose of our legal system is not to provide an abstract code of rigid rules; rather it is to promote values that are compatible with the vision of a just existence for all individuals.").

research arguments that the other side does not make . . . ." *Gwaduri v. INS*, 362 F.3d 1144, 1146 (9th Cir. 2004). But what's sauce for the goose is supposed to be sauce for the gander. "Right?"

Events transpiring after initial publication of the majority's opinion granting Kennedy relief make clear the dangers inherent in my colleagues' eagerness to overreach from the bench. In their prior opinion–helping prove the wisdom of the age-old adage that "bad facts make bad law"–the majority repeatedly emphasized the bad "fact" that a single prosecutor was responsible for both of Kennedy's trials. For instance, the court noted in now-deleted language developing the factual basis for its decision that "[t]he prosecutor remained the same for both trials; he, thus, had personal knowledge of all that transpired during the prior proceedings," *Kennedy*, 372 F.3d 1013, 1016-17 (9th Cir. 2004), and it emphasized that "during the second trial, the prosecutor, who was aware that the prior trial judge had excluded any mention of Kennedy's alleged gang involvement, proceeded, deliberately, to elicit testimony from Detective McDowell on the subject of gangs." *Id.* at 1017. Ultimately, the court concluded,

> In hindsight, it is difficult to conclude that the omitted portions of the transcript would not have been important to Kennedy in preparing an effective defense, particularly where, as here, the prosecutor had a distinct advantage in presenting the government's case, having been present when the defense delivered its opening and closing arguments and throughout all of the proceedings both before and during the first trial.

Id. at 1029-30.

From such factual characterizations, one would have thought this case is, at bottom, about an overzealous prosecutor's nefarious plot to railroad a hapless defendant. How . . . socially

unjust! There is only one problem: The State's petition for rehearing en banc–which, by the way, is the first opportunity the State has had to respond to the majority's lawyering at the oral argument–reveals that *different* prosecutors handled Kennedy's two trials. The majority's factual predicate was utterly baseless.

In the end, one would be hard-pressed to find a better illustration of what *Sophanthavong* had in mind when it identified how clearly prejudicial it can be for a court to overlook a party's clear waiver (not to mention a party's outright concession, as in this case): "The unfairness of such a tactic is obvious. Opposing counsel is denied the opportunity to point to the record to show that the new theory *lacks legal or factual support*." *Sophanthavong*, 365 F.3d at 737 (emphasis added).

B

Kennedy's personal failure to present any cogent basis for thinking he was prejudiced by the state trial court's alleged *Britt* error aside, the thin reed relied upon by the majority hardly suffices to demonstrate that the Court of Appeal's finding of harmlessness was objectively unreasonable. In its decision on direct appeal, the Court of Appeal noted that beyond Detective McDowell's statement that "a lot of people use ['cuz']," the *prosecution* elicited an acknowledgment from McDowell that the term often is used simply to refer to people from one's own neighborhood. *See Kennedy v. Terhune*, No. D027718 at 7. It is perhaps for that reason that the defense *never objected* to McDowell's testimony regarding gang affiliation: Considered in context, McDowell's "allusion to gang membership was not significant." *Id.* & *id.* at 17. Indeed, it was laughable--as the Court of Appeal quite reasonably concluded.

Defense counsel's failure to object to the testimony has an additional significance: It undermines the chain of causation the majority uses to connect the trial court's failure to provide

Kennedy a complete transcript to some meaningful error on retrial. The court speculates that, on notice of the need to object to McDowell's potentially prejudicial testimony concerning Kennedy's possible gang affiliation, there is "little doubt that Kennedy's counsel in the second trial would have presented a similar motion with a substantial likelihood of success." Opinion at 11395. Indeed, the majority tells us that counsel "would undoubtedly have based a motion to exclude on the arguments already presented." *Id.* at 11395 n.16. Yet, confronted in court with McDowell's etymological testimony, counsel did not even seek to exclude it from the record as irrelevant or prejudicial. The majority's confidence that counsel would have acted differently prior to trial thus defies sound reason.

At the same time it undermines the majority's speculative chain of causation, counsel's failure to object to McDowell's testimony breaks it. For, in a variety of contexts, we have repeatedly recognized that contemporaneous objections can prevent reversible error stemming from the improper admission of prejudicial remarks by providing an opportunity for the court to purge the record or offer a curative instruction. *See, e.g.*, *Davis v. Woodford*, 333 F.3d 982, 997 (9th Cir. 2003) (prosecutorial misconduct/documentary vouching); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001) ("Doubtless, contemporaneous objections at trial are to be encouraged. Where objections are made, there may be an opportunity for the trial judge to foreclose further error or to provide a curative instruction.") (civil litigation/appeal to racial prejudice); *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (improper admission of pre-trial law enforcement officer statements); *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988) ("Although the prosecutor's behavior at trial might have approached misconduct, any error could have been cured by contemporaneous objections.") (prosecutorial misconduct/ argumentative vouching); *Jeffries v. Blodgett*, 5 F.3d 1180,

1192 (9th Cir. 1993) (prosecutorial misconduct/commenting on defendant's refusal to testify); *U.S. v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (prosecutorial misconduct/ referencing a non-testifying defendant's out-of-court behavior); *U.S. v. Stephens*, 486 F.2d 915, 918 (judicial misconduct/ instructing jury on how to weigh evidence); *see also supra* at 6, n.3. Thus, whatever impact McDowell's gang testimony may have had on Kennedy's trial–and again it was not unreasonable to conclude that it had none–it cannot be attributed to the trial court's refusal to deliver Kennedy a complete transcript of his initial trial.

Were this not enough, the State's petition for rehearing en banc drives yet another nail through the heart of the court's opinion. Perhaps the most important step in the majority's logic was its assertion that the court on retrial would have been bound by the previous decision to exclude any gang testimony from Kennedy's mistrial, such that any motion by Kennedy to exclude such testimony would have had "a substantial likelihood of success," *Kennedy*, 372 F.3d at 1027:

> Although we have found no California cases addressing the exact issue presented here, generally "under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997). A second judge will generally follow a ruling made by an earlier judge unless the prior decision was erroneous, is no longer sound, or would create an injustice. *Id.* None of the exceptions to the application of this basic doctrine exists here.

Id. at 1027 n.16.

Not so fast. Like its unsupported (and, until the State's petition for rehearing en banc, unrebutted) assertion that a single prosecutor was responsible for both Kennedy's mistrial and retrial, the majority's resort to generic law of the case principles turns out, again, to have been utterly baseless. For as the State points out in its petition for rehearing en banc–again taking advantage of its first real opportunity to respond to arguments developed and deployed by the majority at oral argument–law of the case doctrine actually does not apply to trial court decisions in California. *See* 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1997) (collecting cases). Poof! Gone is the premise for the majority's speculative prediction that a motion to exclude gang testimony would almost certainly have been granted at retrial; in reality, the majority has absolutely no idea whether a motion to exclude would have been successful or not. At bottom, given the (new) prosecutor's efforts to minimize the impact of the already laughable gang testimony, and in light of the severe gaps in the majority's speculative chain of causation between any alleged *Britt* error and the introduction of gang testimony on retrial, no fair-minded jurist could conclude that it was objectively unreasonable for the Court of Appeal to have determined that any constitutional error was harmless.

Finally, I observe that there were ample additional reasons to believe that McDowell's allegedly prejudicial statements did not impact the jury's determination that Kennedy had committed the offense charged. In addition to the detective's persuasive testimony concerning the circumstances of petitioner's sale of a non-controlled substance in lieu of a con-trolled substance, Kennedy's "cousin," Randall Tucker, testified to delivering McDowell the paper bag containing the non-controlled substance (though he denied his own intent and any misrepresentation of its contents). As a result of that denial, the prosecution then lawfully impeached Tucker with evidence that he had pled guilty to the very offense at issue in Kennedy's trial.

Given such powerful trial testimony to the jury suggesting petitioner's guilt, it seems something of a stretch to think that the jury's verdict would have been different had McDowell not been allowed to intimate that, among other completely innocuous meanings, the lingo "cuz" had gang significance.[8]

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8. Though superficially plausible, we have previously declined to adopt the majority's theory that lengthy deliberations necessarily support a finding of prejudicial error. *See* Opinion at 11397 & n.18. Indeed, in *United States v. Galindo*, 913 F.2d 777, 779 (9th Cir. 1990), we drew precisely the opposite inference. There, we addressed two criminal defendants' claims that they were incurably prejudiced by the judge's reference to ongoing plea negotiations. Rejecting the assertion, "we noted that the jury deliberated approximately three full days after a trial that lasted about that same length of time. Although this is a circumstance which in a given case can indicate a confused jury, here it negates any suggestion that the jury was stampeded to a verdict against the [defendants] out of prejudice resulting from the district court's statement at trial about plea negotiations." *Id.* at 779.

I do not mean to suggest that *Galindo* rules out the majority's argument. Indeed, we have reached such a conclusion in other cases. *See, e.g.*, *Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir. 2003) (per curiam); *Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002). But the majority's opinion in this case hinges on the introduction of prejudicial testimony--precisely the kind of occurrence that, like a judge's indication to the jury that a defendant is considering pleading guilty, could lead a jury to "stampede to a verdict." As in *Galindo*, that did not happen here. And the fact that we have refused to draw the majority's inference on direct appeal in closely analogous circumstances in turn supports the reasonableness of the state court's decision not to draw the inference below. For if a "difference of opinion among the courts of appeal [means] we cannot say that the state court unreasonably applied clearly established Federal law," *Bailey v. Newland*, 263 F.3d 1022, 1032 (9th Cir. 2001), then a difference of opinion *within this* court of appeals would seem to suggest that we may not conclude that the state court's harmlessness determination was objectively unreasonable.

III

Apparently in search of a result, the majority yet again runs roughshod over the principles of comity and federalism underlying the Antiterrorism and Effective Death Penalty Act. "Premised on the fact that the state courts, as part of a coequal judiciary, are competent interpreters of federal law deserving of our full respect," *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003), AEDPA mandates a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and adamantly "demands that state court decisions be given the benefit of the doubt." *Brodit v. Cambra*, 350 F.3d 985, 987 (9th Cir. 2003) (quotation and citation omitted). Notwithstanding the eminent reasonableness of their colleagues' analysis, two judges today inform seven others–a state trial judge, three state appellate judges, a federal magistrate judge, a federal district court judge, and a federal appellate judge (and that's not to mention the seven Justices of the California Supreme Court who summarily denied Kennedy's state petition for review)–that their understanding of the law is contrary to clearly established Supreme Court precedent. Again, one is tempted to ask: "Objectively, who is being unreasonable?" *Payton v. Woodford*, 346 F.3d 1204, 1225 (9th Cir. 2003) (en banc) (Tallman, J., joined by Kozinski, Trott, Fernandez, and T.G. Nelson, JJ., dissenting), *cert. granted sub nom. Goughnour v. Payton*, 541 U.S. ___, ___ S. Ct. ___, 2004 WL 102831 (May 24, 2004).

Our apparent inability to internalize AEDPA's strict standard of review has become a source of repeated public embarrassment. During the past two terms alone, we have been summarily reversed by a unanimous Supreme Court no fewer than *four times* for disregarding AEDPA's strict limitations on the scope of our collateral review of state court constitutional adjudications. *Middleton v. McNeil*, 541 U.S. ___, 124 S. Ct. 1830 (2004) (per curiam), *rev'g* 344 F.3d 988 (9th Cir. 2003);

Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 2002). Because we are once again "nowhere close to the mark," *Yarborough v. Alvarado*, 541 U.S. ___, 124 S. Ct. 2140, 2004 WL 1190042 (June 1, 2004), *rev'g Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), I lamentably, yet respectfully, dissent.

APPENDIX B

[Filed June 28, 2004]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. KENNEDY, Petitioner-Appellant, v. **BILL LOCKYER,** Attorney General, State of California Respondent-Appellee.	No. 01-55246 No. CV-9-02505-BTM **PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC**

TO THE HONORABLE STEPHEN REINHARDT, DIARMUID F. O'SCANNLAIN, AND RAYMOND FISHER, CIRCUIT JUDGES:

Respondent-Appellee, Bill Lockyer, Attorney General of California, respectfully requests rehearing and suggests rehearing *en banc* of the June 14, 2004, opinion of this Court. Appendix A ("App. A") contains the slip opinion ("slip opn.") which reversed the denial of Petitioner-Appellant Robert E. Kennedy's Petition for Writ of Habeas Corpus. Fed. R. App. P. 35, 40. Rehearing is necessary because this Court departed from its typical rules of appellate practice, which resulted in a flawed and distorted understanding of the historical record and a faulty analysis that Kennedy suffered prejudice. Attorney General Lockyer has included a suggestion for rehearing *en banc*, moreover, because this Court failed to apply controlling

United States Supreme Court authority in determining the question of prejudice, which has resulted in an intra-circuit conflict with a case decided nine days after the opinion in Kennedy's matter. See *Medina v. Hornung*, No. 02-56484 (9th Cir. June 23, 2004) (citing *Mitchell v. Esparza*, 124 S. Ct. 7, 12, 157 L. Ed. 2d 263 (2003).

ARGUMENT

I.

REHEARING SHOULD BE GRANTED TO CORRECT FACTUAL MISSTATEMENTS THAT RESULTED FROM UNWARRANTED DEPARTURES FROM NORMAL RULES OF APPELLATE PRACTICE AND TO EVALUATE WHETHER THE STATE COURT'S HARMLESS ERROR DETERMINATION WAS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, UNITED STATES SUPREME COURT AUTHORITY

Kennedy's first trial in state court ended in a hung jury. Before retrial, his counsel requested transcripts of the witnesses' testimony. Kennedy later elected to represent himself and new counsel was appointed to advise him. Subsequently, the trial court ascertained that the transcribed trial testimony had been given to Kennedy and denied Kennedy's request for a more complete transcript, including motion hearings, opening statements and closing arguments. When Kennedy appealed from his conviction, the state appellate court found the trial court had "substantially complied" with the constitutional requirement to provide an indigent defendant transcripts and held that any error was harmless beyond a reasonable doubt. In concluding there was no prejudice to Kennedy, moreover, the state court found the prosecutor had successfully minimized a

witness' passing suggestion that Kennedy may have been linked to a gang. (See Excerpt of Record ("E.R.") at 7.)

A divided panel of this Court, however, granted Kennedy habeas corpus relief. Rather than accept Kennedy's argument that he was entitled to relief because the denial of a complete transcript amounted to structural error – which is how Kennedy briefed his claim in the District Court and, with the exception of one passage at the end of his reply brief, in this Court as well – the majority found Kennedy was entitled to relief under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Respectfully, however, this majority assumed facts that are contrary to the record and made faulty assumptions that resulted in a serious misapplication of the prejudice analysis.

Second, the majority committed a legal error by not granting any of the required deference to the state court's alternative holding that any error in supplying Kennedy with a complete transcript was harmless beyond a reasonable doubt. More than seven months ago, the Supreme Court made clear in *Mitchell v. Esparza*, 124 S. Ct. at 12, that a state court's finding of a harmless error should be evaluated under the deference standard of 28 U.S.C. § 2254(d). This holding was recognized by another panel of this Court in *Medina v. Hornung*, No. 02-56484 at 8382-83, nine days after the majority issued the opinion in Kennedy s case. Although the majority opinion should have cited and followed *Esparza*, this inter-circuit conflict supports resolution of the issue *en banc*.

A. Applicable Law

A petition for rehearing is appropriate where the panel's decision is based on a misunderstanding of material facts or issues in the case. Fed. R. App. P. 40(a)(2); *see e.g. United States v. Koyomejian*, 946 F.2d 1450, 1462 (9th Cir. 1991) (rehearing granted where court's opinion relied on inaccurate

facts). Rehearing *en banc* is appropriate to ensure the uniformity of decisions within this Circuit. *See* Fed. R. App. P. 35.

In *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), the Supreme Court stated that, "the State must, as a matter of equal protection, provide indigent defendants **with the basic tools of an adequate defense or appeal**, when those tools are available for a price to other prisoners." This Court's jurisprudence makes it clear that *Britt* errors are subject to harmless error review. *See e.g., United States v. Rosales-Lopez*, 617 F.2d 1349, 1355-56 (9th Cir. 1980).

B. The Majority Derailed the Normal Appellate Process of Fact and Issue Development in Contravention of This Court's Recently Enacted Rules Which Resulted in a Flawed and Skewed Appreciation of the Factual Background of the Claims

Here, in the state appellate court and the district court, Kennedy contended that automatic reversal was required because the trial court refused his request for a complete transcript of his first trial despite his failure to explain why he needed additional portions of the transcript other than the trial testimony of the witnesses in order to prepare for his defense upon retrial. (E.R. at 6, 49.) Although the Certificate of Appealability issued by the district court directed Kennedy to address "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of [Kennedy]'s rights and whether it was harmless error," (E.R. 76), Kennedy's opening brief failed to allege that any prejudice stemmed from the trial court's refusal to provide him with a "full" transcript and asserted that no showing was necessary because it was structural error. Attorney General Lockyer's answering brief demonstrated this claim was subject to harmless error review. Nonetheless, Kennedy did not suggest that he was in any way

prejudiced until the final sentence of his reply brief, where he only stated:

> In this case there is clearly a grave doubt whether the State courts' erroneous failure to prove Petitioner with a complete transcript of the prior mistrial that took place 7 months before the second jury trial in which Petitioner was represented by a different attorney was harmless.

(App. A - slip opn. at 7883; Kennedy's Reply Brief at 14-15.)

Kennedy's reliance below only on an argument that the failure to provide him a complete transcript was structural error (App. A - slip opn. at 7868 n.15, 7883 n.5) resulted in a lack of a factual development as to how he was prejudiced by not having a complete transcript in presenting an adequate defense at his retrial. Kennedy never has claimed to any court that he did not receive a copy of the pretrial motions in his case or that his counsel on retrial was not aware of the prior trial court's ruling that excluding any mention of Kennedy's gang involvement. Of course, if Kennedy had such knowledge, he could not have been harmed by not having a transcript of a pretrial motion hearing.

Appellate courts ordinarily will not consider matters on appeal that are not "specifically and distinctly" raised and argued in the opening brief. *T.R.W. Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *see also Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in a reply brief are waived."). However, the majority determined that, once Kennedy's structural error argument was rejected, it was obligated to conduct a harmless error analysis of the "**record as a whole**" under *Brecht*. (App. A - slip opn. at 7868 (citing *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). The majority's decision, however, makes it unclear as to whether when, if ever, a party's failure to raise a harmless error claim under *Brecht* in a habeas corpus petition reviewed by a district

court or this Court under the AEDPA is waived. (App. A - slip opn. at 7883-84.)

Further, in *Sophanthavong v. Palmateer*, 365 F.3d 726, 737 (9th Cir. 2004), this Court noted the "obvious" prejudice wrought by allowing litigants to raise arguments for the first time in reply, where doing so deprives opposing counsel of "the opportunity to point to the record to show that the new theory lacks legal or factual support." Also, this Court has recognized the importance of allowing a party the opportunity to brief issues before any relief is granted. *See e.g.*, Circuit Rule 22-1(e). Here, such an opportunity would have allowed Respondent-Appellee to point out to the panel any misunderstanding of material facts contained in the record and would allow the panel a better assessment of the harmless error analyses by the state court and the district court. (*See* E.R. 6, 49.)

The majority's holding that Kennedy had not waived the harmless error argument and suggestion that no one could "have been prejudiced in any way by defense counsel's failure to address the prejudice question more directly," (App. A - slip opn. at 7869 n.15, 7883 n.5) resulted in the panel overlooking or misapprehending the following material points of law or facts contained in the record:

The majority's decision rests on an improper assumption that the prosecutor remained the same for both trials and, thus, had personal knowledge of all that transpired during the prior proceedings, including a ruling excluding any mention of Kennedy's gang involvement. (App. A - slip opn. at 7851, 7853.) The record, however, indicates that there were different prosecutors during the first trial, which ended in a mistrial (E.R. at 90, Court Record ("C.R.") at 11- I, Reporter's Transcript ("R.T.") at 1-123; II Clerk's Transcript ("C.T.") at 210-19), and the second proceeding where Kennedy was convicted (E.R. at

90, C.R. at 11- I, RT at 16, 19-146; II CT at 237-49). This factual error led the majority to draw an erroneous conclusion that at the retrial the prosecutor intentionally and improperly introduced evidence to show gang involvement on Kennedy's part. (*See* App. A - slip opn. at 7847, 7853.) In fact, the prosecutor on retrial tried to minimize the witness' testimony that a reference to "cuz" is used not only in reference to gang members, but also to refer to persons who work together or persons from the same neighborhood. (E.R. at 90, C.R. at 11- II RT at 40.)

The majority also states, in an issue that was never briefed, that if Kennedy's new counsel had access to a transcript of the pretrial proceedings, he would have re-raised the motion, which would likely have been granted to exclude gang references or testimony based upon the law-of-the case doctrine. (App. A - slip opn. at 7869 n.16.) Under California law, however, the law-of-the-case doctrine is inapplicable to trial court decisions but only applies to a decision of an appellate court in the same case. *See* 9 Bernard E. Witkin, *California Procedure*, § 896, pp. 930-31 (4th ed. 1997) (and cases cited therein). Accordingly, even if Kennedy's counsel had brought a motion to exclude any reference to gangs or gang testimony, the judge on retrial was not bound to follow the first judge's order.

The majority's opinion rests on an assumption that the transcript of the witnesses' testimony in the first trial would not be helpful to the defense because it was devoid of any mention of gang involvement or gang language. (App. A - slip opn. at 7851-52.) However, the record shows that the term "cuz," which arguably may intimate gang involvement, was introduced at the first trial and, presumably, was contained in the transcripts that were provided to Kennedy. (E.R. at 90, C.R. 11 - I RT at 27, 87.) Further, the record shows that when Kennedy asked the trial court if he could get "all the paperwork to the case with [first trial counsel's] notes," first trial counsel told the

court that she would be providing Kennedy not only the transcript of the witness's testimony at the first trial, but also her notes and discovery. (E.R. 90, C.R. 11 - 9/16/96 RT at 6-7.) Further, prior to retrial, Kennedy's stand-by counsel, who became his trial counsel, stated that Kennedy requested a full transcript, including all motions, opening statements and final argument so he could prepare for his next trial. The trial court responded, "He's entitled to trial testimony. All the motions were in writing, right?" (App. A - slip opn. at 7852.) This exchange indicates the trial court alerted Kennedy and his stand-by counsel that the court record contained all written motions and orders containing the court's rulings. However, there is no allegation by Kennedy that either he or his counsel on retrial did not receive these materials from Kennedy's first counsel, that they were unaware of any documents contained in the court's file which would alert them to use of "cuz" or any potential gang issue, or that the failure to have these materials somehow actually harmed Kennedy's ability to present an effective defense at his retrial.

C. The Majority Failed to Defer to the State Court's Ruling and Established a Rule That Exceeds What is Required by Supreme Court Precedent as Recognized by This Court

The Supreme Court recognized in *Britt* that an indigent defendant is entitled to some portion of the transcript to prepare for an adequate defense on retrial, but that the "outer limits of that principle are not clear." (*Britt*, 404 U.S. at 227) Distinct rulings by various circuit courts cited by both the majority and the dissent (App. A - slip opn. at 7857, 7859, 7878-79) show that *Britt* is not specific enough to dictate a certain result. Accordingly, rehearing *en banc* is required for this Court to properly determine whether an indigent defendant is always entitled not only to a transcript of all testimonial evidence, but also one containing opening and closing arguments and a

recounting of all preliminary trial motions pursuant to clearly established Supreme Court precedent.

The majority committed legal error by not deferring to the state court's conclusion that any error in supplying Kennedy with a complete transcript was harmless beyond a reasonable doubt. (E.R. at 6-7.) As previously discussed, the Supreme Court made clear in *Mitchell v. Esparza*, 124 S. Ct. at 12, that a state court's finding that an error was harmless should be evaluated under the deference standard of 28 U.S.C. § 2254(d). This holding was recognized by another panel of this Court in *Medina v. Hornung*, No. 02-56484 at 8382-83, nine days after the majority issued the opinion in this case. The majority's failure to follow *Esparza* creates an inter-circuit conflict that supports rehearing *en banc*.

Here, the majority concluded that the state appellate court's decision was "contrary to" *Britt* because it added a "substantial compliance" component to *Britt*'s requirement that "the State must provide an indigent defendant with a transcript of a prior proceeding when that transcript is **needed for an effective defense or appeal**." (App. A - slip opn. at 7863-65; *see also Britt*, 404 U.S. at 227 (emphasis added).) However, as pointed out by the dissent, the term "substantial compliance" as used by the state appellate court did not create a new component to *Britt*, but represented its reasonable conclusion that the partial transcript delivered to Kennedy satisfied *Britt*'s requirement that indigent defendants be given only those portions of a transcript which are necessary basis for a constitutionally competent defense on retrial. (App. A - Slip opn. at 7879.) Instead of the specific rule dictated by the majority that an indigent defendant is entitled to the entire transcript, including all pre-trial proceedings, *Britt* identified two factors relevant to the determination of such need: (1) the value of the transcript in connection with the appeal or trial for which it is sought, and (2)

the availability of alternative devices which would fulfill the same functions of the transcript. *Britt*, 404 U.S. at 227.

In *Yarborough v. Alvarado*, No. 02-1684, 2004 LEXIS 3834 (June 1, 2004), the Supreme Court reviewed a state court determination that a person was not in "custody" under the standard set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). In so doing, the high court more properly analyzed the question under the "unreasonable application" of clearly established law under AEDPA because the nature of its "custody"rule was more general than specific. *Yarborough v. Alvarado*, 2004 U.S. LEXIS 3834, at *23. The Court explained that a consideration of whether a state court's application of its rules was "unreasonable," requires a consideration of its specificity. The Court stated, "The more general the rule, the more leeway [state] court's have in reaching outcomes in case by case determinations." *Id.* (Citation omitted). Given *Britt*'s pronouncement that the "outer limits" of the rule that indigent defendants must be provided with"the **basic tools of an adequate defense or appeal**" are not clear (*Britt*, 404 U.S. at 227), it was not objectively unreasonable for the state appellate court to have found that affording Kennedy a free transcript of all the testimony in the prior trial was sufficient, and that his failure to articulate any specific reason for other portions of the record demonstrated that they were "not needed for an effective defense." The District Court reached the same conclusion. (App. A - slip opn. at 7882-83; see also E.R. at 6-7, 49.)

En banc review is proper to resolve an irreconcilable conflict between circuit precedents. Fed. R. App. P. 35(a)(1); *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). Cases in this circuit have not clearly held that a "full transcript" of a prior proceeding related to a criminal prosecution that resulted in a mistrial, must always be provided to an indigent defendant before retrial.

The majority's conclusion that Supreme Court authority, including *Britt*, clearly require that a transcript of all pre-trial as well as trial proceedings, and of the opening and closing arguments, must always be provided to an indigent defendant (App. A - slip opn. at 7857, 7859, 7877), appears to be in conflict with prior pronouncements by this court in *United States v. Rosales-Lopez*, 617 F.2d at 1356, and *United States v. Kirk*, 844 F.2d 660, 662 (9th Cir. 1988), that "the standard of reasonable necessity in the area of free transcripts remains imprecise," the "outer limits" of providing an indigent defendant with the basic tools for an adequate defense is "not clear," and the principle of providing a free transcript is not absolute. Rehearing is necessary to allow court's to conduct a meaningful harmless error analysis as a result of a denial or partial denial of an indigent defendant's request for a transcript for purposes of presenting an adequate defense upon retrial. *See United State v. Rosales-Lopez*, 617 F.2d at 1355 (this court will not reverse a conviction if the denial of a transcript request is harmless beyond a reasonable doubt); *see also* App. A - slip opn. at 7878 n.2.)

Further, insofar as the majority's decision in this case overrules established precedent by this court, rehearing *en banc* is appropriate. *See Williams-Scaife v. Department of Defense Dependent Schools*, 925 F.2d 346, 347 (9th Cir. 1991); *United States v. Aguon*, 851 F.2d 1158, 1160 (9th Cir. 1988). Accordingly, panel rehearing with a suggestion for rehearing *en banc* is appropriate in this case pursuant to Fed. R. App. P. 35 and 40.

CONCLUSION

For the foregoing reasons, Attorney General Lockyer respectfully requests rehearing by the full panel or rehearing by the *en banc* Court.

Dated: November 14, 2004.

Respectfully submitted,

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APPENDIX C

[Filed June 14, 2004]
[Argued and Submitted June 5, 2003]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. KENNEDY, Petitioner-Appellant, v. **BILL LOCKYER**, Attorney General, State of California, Respondent-Appellee.	No. 01-55246 No. CV-99-02505-BTM **OPINION**

COUNSEL

Jeff Dominic Price, Esq., Santa Monica, California, for the appellant. Lora Fox Martin and Anthony DaSilva, Deputy Attorney Generals, San Diego, California, for the appellee.

OPINION

REINHARDT, Circuit Judge:

Robert Kennedy was tried twice on a charge of selling 0.08 grams of a substance in lieu of a controlled narcotic drug – a substance that looked like an illegal drug but wasn't – to an undercover police officer for $20. The first trial ended in a hung jury: four jurors favored finding Kennedy not guilty; eight

jurors thought him guilty. Prior to his second trial, Kennedy twice asked the state court to provide him with a complete transcript of the earlier proceeding. It refused to do so. Instead, it granted him only the portion of the transcript that contained the witnesses' testimony and denied him the portion that contained the parties' motions and the court's rulings thereon, as well as the court's instructions and the parties' opening statements and closing arguments.

At the second trial, Kennedy was represented by a new attorney who proceeded without the aid of a complete transcript of the prior trial. Aware that the new attorney did not have the full transcript, the state introduced evidence intended to show gang involvement on Kennedy's part – evidence that had been excluded from the first trial after a successful pre-trial motion to suppress. This time, after a one day trial and three days of deliberations, the jury returned a guilty verdict. Because Kennedy had two prior serious or violent offenses, he was sentenced for the $20 sale of a non-drug to a prison term of twenty-five years to life, pursuant to California's Three Strikes Law, Cal. Penal Code §§ 667(e) and 1170.12(c)(2) (2003).

Kennedy appeals the district court's dismissal of his habeas corpus petition. He argues that his Fourteenth Amendment right to due process and equal protection was violated when the state court denied his request for the full transcript of his first trial. Because the state court's decision was contrary to clearly established Supreme Court law, we reverse the district court and direct it to grant Kennedy's habeas petition.[1]

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1. In view of our holding, we do not reach Kennedy's two other claims: (1) that he was prejudiced by his counsel's ineffective assistance, and (2) that California's Three Strikes Law is unconstitutionally vague.

I

The Second Trial

The prosecution's principal witness in the second trial, as in the first, was Detective Leroy McDowell of the San Diego Police Department. Detective McDowell testified that he was working undercover narcotics detail in casual clothes one afternoon in October of 1995. Another officer dropped him off near the intersection of 22nd and J Streets in San Diego. McDowell testified that when he saw Kennedy and Randall Tucker across the street, he made eye contact with Kennedy and nodded his head. McDowell said that he approached the two men and asked, "Are you serving?," meaning in street terminology, "Are you selling drugs?" Tucker responded by saying, "What?" McDowell testified that he asked the question again and Tucker responded, "What do you want?" McDowell said he told the two men that he wanted a "2-0," which he testified means $ 20 of rock cocaine or another controlled substance. In response, Tucker asked, "2-0 of what?;" McDowell said he repeated, "2-0."

McDowell said that Kennedy then asked for money, and he took a prerecorded $20 bill from his pocket and gave it to him. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to the fence, picked up a paper bag, and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance. Tucker asked if McDowell was a police officer, and McDowell said, "No, why would I be down here if I was the police?"

McDowell testified that he looked in the bag, told Tucker that there was not enough there, and asked him to give him some more. Tucker then said, "That's all we have. Come back later we'll give you some more." McDowell then said, "No, at least give me $ 5 of my money back."

McDowell walked away from Kennedy and Tucker and alerted the other officers who were waiting nearby. The officers then moved in and arrested the two. In Kennedy's pocket, they found the marked $20 bill. The bag contained 0.08 grams of a "non-controlled substance" that had the appearance of an illegal drug.

Although Tucker pled guilty after the first trial, and thereby avoided a three-strike twenty-five years to life sentence,[2] he testified for the defense at the second trial. His testimony differed from McDowell's. Tucker testified that he and Kennedy had been hanging out in the area all day and earlier had been stopped and patted down by police, who found nothing on either man. Tucker told the jury that, when McDowell approached the two, no drugs were ever mentioned but that he noticed McDowell had money in his hands. Tucker said McDowell handed the money to him. Because McDowell was "pushing too much," Tucker walked over to a nearby area, picked up a piece of paper bag, and gave it to McDowell. Tucker said "2-0" and "are you serving" can mean different things, and that he did not know what McDowell wanted.

In addition to Detective McDowell's testimony regarding the actual event, the prosecution elicited "gang" testimony from him. The prosecutor asked McDowell if he could tell the jury what the word "cuz" meant, as it was used by Kennedy during the transaction. He replied, "Terminology used by Cripp gang members." The prosecutor persisted, "Is it on the street used for – commonly used between individuals that are working together?" McDowell answered, "Generally, it was most – a lot

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2. Because Tucker had two prior strikes for violent felonies, if a jury had convicted him of the offense he was charged with, he would in all likelihood have been sentenced to, at a minimum, twenty-five years to life pursuant to California's Three Strikes law. Instead, he entered into a plea agreement with the prosecution striking his prior offenses in return for a guilty plea, and received a sentence of 32 months.

of people use it and – but basically gang members and those that want to be gang members."

Procedural History

The first trial was a joint trial of the two co-defendants. At a pre-trial hearing, Kennedy's counsel moved in limine to exclude all references to any gangs and any gang affiliation; the court granted the motion in a written order which provided that, "There will be no mention of 'gangs or gang affiliation,' unless cleared by the Court, out of the presence of the jury."

During the discussion of the motion, the court explained that evidence of possible gang involvement, if introduced at all, could be used only for impeachment purposes, to prove Kennedy and Tucker's relationship. Before the prosecution could impeach Kennedy on this basis, however, the judge stated that he would hold a hearing outside the presence of the jury, after which he would make a determination as to whether the evidence should be admitted for even this limited purpose. The judge told the prosecutor he would "have to be pretty convincing before [he would] let that [evidence] come in." The transcript of the discussions regarding the motion to exclude and the court's ruling thereon was not given to Kennedy or his counsel prior to the second trial. The prosecutor remained the same for both trials; he, thus, had personal knowledge of all that transpired during the prior proceedings.

As soon as the mistrial was declared, Kennedy's counsel moved for a complete transcript of the first trial in order to prepare for the expected second trial. The judge ruled that Kennedy was entitled only to a transcript of the trial testimony; he denied him the remainder of the transcript, including the parties' opening statements and closing arguments, evidentiary motions and rulings, jury instructions, and all other motions and

colloquies. The following exchange occurred between Kennedy's counsel and the court:

> [Counsel]: Your Honor, I'd also ask for an order for a transcript being prepared for the purpose of the next trial.
>
> [Court]: Well, you can submit that to the court after -- I'd -- I'd -- I would hope that wouldn't be necessary to go to that expense, but I'd like to explore some disposition short of that. But if it's going to trial then I think the case law says that you're entitled to that transcript, just of the testimony, not of the entire trial.
>
> [Counsel]: That's fine, your Honor.
>
> [Court]: All right.

A second trial date was then scheduled. During a pre-trial hearing, Kennedy told the judge that he was dissatisfied with his counsel's representation and moved to proceed *pro se*. The motion was granted and new stand-by counsel was appointed. At the hearing, before relieving counsel of her responsibilities, the court inquired whether she had ordered a transcript of the first trial. She responded that she already had one and would make it available to Kennedy. In fact, however, counsel had only the transcript of the witnesses' testimony at trial, not the full proceedings.

Ten days later, Kennedy, now proceeding *pro se*, asked the court to provide him with a full trial transcript in order to enable him to prepare for the second trial. During the hearing on this motion, Kennedy told the judge that he did not have his "full trial transcripts" and that he only had the testimony of the witnesses at the first trial. He told the judge that he needed, at the very least, the transcript of "all motions, opening statements, and final argument." Kennedy and his stand-by counsel (who

later became appointed counsel)[3] explained that Kennedy needed to review the full transcript so that he could prepare his defense for the second trial. The court denied the request.[4]

During the second trial, the prosecutor, who was aware that the prior trial judge had excluded any mention of Kennedy's alleged gang involvement, proceeded, deliberately, to elicit testimony from Detective McDowell on the subject of gangs.

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3. At the commencement of Kennedy's second trial, he moved to terminate his *pro se* status and have stand-by counsel appointed as his trial counsel. The motion was granted.

4. The court colloquy regarding this request was:

> [Stand-by Counsel ("Gayton")] It's only the trial testimony that's been made available. I think counsel agreed only -- stipulated to trial testimony, because I believe she felt that she was going to be trying the case, Ms. Feral. But since she's not trying the case, he's requesting the full transcript, including all motions, openings statement and final argument.
>
> [Court] Why does he need that?
>
> [Gayton] He needs to review that in order to prepare for his next trial.
>
> [Court] Why?
>
> [Gayton] He thinks a lot of those --
>
> [Court] He's entitled to trial testimony. All the motions were in writing, right?
>
> [Gayton] I don't know, I wasn't there. But, I mean, I consulted with Ms. Feral, and she said that she had requested a full trial transcript . . . .
>
> [Court] Denied. Anything else?

The prosecutor asked Detective McDowell what the word "cuz," used by Kennedy during the street discussion, meant. McDowell testified that when Kennedy said, "Give it to him cuz," that "cuz" was "terminology used by Cripp gang members." On further questioning by the prosecutor, McDowell elaborated, stating that "cuz" is a phrase "basically" used by "gang members and those that want to be gang members."

The trial lasted one day, but the jury deliberated for three. During the course of their deliberations, the jurors asked that McDowell's testimony be read back to them. Ultimately, the jury returned a guilty verdict, and the court sentenced Kennedy to a prison term of twenty-five years to life pursuant to California's Three Strikes Law. Cal. Penal Code §§ 667(e) and 1170.12(c)(2).

The California Court of Appeal affirmed the conviction. After the California Supreme Court summarily denied review, Kennedy filed a habeas corpus petition in federal court. The magistrate judge recommended dismissal of the petition, and the district court adopted the magistrate's recommendation. Kennedy appealed.

II

AEDPA Standard of Review

We review *de novo* the district court's decision to grant or deny a petition for habeas corpus. *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000). The petition in this case was filed on November 26, 1999, well after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996("AEDPA"). Therefore, AEDPA's provisions apply, and our review of the state court's decision is governed by them.

Under AEDPA, we may grant a writ of habeas corpus to a person in state custody only if the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding," 28 U.S.C. § 2254(d)(2), or the claimed constitutional error "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court's merit determination is "contrary to" United States Supreme Court clearly established law if it applies a rule (1) "different from the governing law set forth in [Supreme Court] cases," *Bell v. Cone*, 535 U.S. 685, 694 (2002), or (2) if it "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Price v. Vincent*, 123 S. Ct. 1848, 1853 (2003).

III

[1] It is well-established that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Applying this fundamental legal principle, the *Britt* Court held that the state is ordinarily required to provide an indigent defendant with the transcript of the proceedings of a prior mistrial in order to aid him in preparing for a second trial. *Id.* at 227-28. Here, the state does not dispute that Kennedy was entitled to a transcript of his prior mistrial. Rather, it contends that, under the relevant Supreme Court cases, an indigent defendant is entitled only to a transcript of trial testimony, not to a full transcript of the proceedings of the prior trial. The state is incorrect.

[2] The Supreme Court held in *Britt* that "the State must provide an indigent defendant with a transcript of *prior proceedings* when that transcript is needed for an effective defense or appeal." *Id.* at 227 (emphasis added). Although the Court did not define "prior proceedings" in its opinion, the meaning of the term is clear. *Black's Law Dictionary* defines "proceeding," in relevant part, as "the regular and orderly progression of a lawsuit, including *all* acts and events between the time of commencement to the entry of judgment."[5] *Black's Law Dictionary* 1221 (7th ed. 1999) (emphasis added); *see also Black's Law Dictionary* 1204 (6th ed. 1990) ("The proceedings of a suit embrace *all* matters that occur in its progress judicially.") (emphasis in original). From the dictionary definition it follows that the most "natural understanding" of "prior proceedings" is one that encompasses *all* of the acts and events that occur from the commencement of the judicial action until the entry of judgment. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2047 (2003) (adopting the most natural understanding of a given term as defined in the dictionary). Because parties' motions, and the court's rulings thereon, as well as opening statements and

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5. *Black's Law Dictionary* specified that:

> the term proceeding may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of law resort.

Id.

closing arguments, and the jury instructions all occur during the course of the judicial action, they are part of the proceedings. In asking this court to limit the meaning of "prior proceedings" to a transcript of witness testimony, the state would have us construe the term so as to violate its ordinary and plain meaning. We are not free to do so. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470-71 (1997) (refusing to adopt the Commission's reading of a term which violated the term's ordinary and plain meaning).

There is nothing in the Supreme Court's *Britt* decision or in any other Supreme Court case dealing with the provision of transcripts of proceedings that would permit the adoption of as narrow and cramped a reading as the state suggests. Rather, the Supreme Court's other relevant decisions support our adoption of the term's literal construction. For example, the Court in *Griffin v. Illinois*, 351 U.S. 12, 13, n.3 (1956), held that, on appeal, indigent defendants must be provided with a free copy of a "report of proceedings," defined by the Court as "all proceedings in the case from the time of the convening of the court until the termination of the trial[,]" including "all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record."[6] The Court's adopted definition of "report of proceedings" closely mirrors the dictionary meaning of "proceeding" provided in *Black's*; because of the *Britt* Court's reliance on *Griffin*, we infer that the Court meant its definition of the term "proceedings" to be the same as the definition of "proceedings" used in *Griffin*. *Britt*, 404 U.S. at 227-28. Further, in *Mayer v. City of Chicago*, 404 U.S. 189 (1971), the

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6. The Supreme Court subsequently extended *Griffin* to require the state to provide indigent defendants with transcripts of (a) state postconviction proceedings, *Long v. District of Iowa*, 385 U.S. 192, 192-94, (1966) (*per curiam*); (b) state habeas evidentiary hearings, *Gardner v. California*, 393 U.S. 367, 370 (1969); and (c) petty offense trials, *Williams v. Oklahoma City*, 395 U.S. 458, 459(1969).

Court held that on appeal an indigent defendant must be provided with a "full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." *Id.* at 195. Again, the Court did not define "full verbatim record," but its meaning is clear. *Black's* defines "record on appeal," as "the history of the proceedings on the trial of the action below (with the pleadings, offers, objections to evidence, rulings of the court, exceptions, charge, etc.), in so far as the same appears in the record furnished to the appellate court in the paperbooks or other transcripts." *Black's Law Dictionary* 1274 (6th ed. 1990).[7] The Court has made it clear that a transcript of pre-trial, as well as trial, proceedings must be provided. *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967) (holding that state court must provide indigent defendant with his preliminary hearing transcript). Courts of Appeal have long understood its rulings. *See, e.g., United States v. Devlin*, 13 F.3d 1361,1365 (9th Cir. 1994) (holding that the state must provide an indigent defendant with a suppression hearing transcript for trial preparation purposes); *United States v. Vandivere*, 579 F.2d 1240, 1243 (10th Cir. 1978) (holding that "the presumption should be that indigent defendants in criminal cases are entitled to a transcript of any preliminary examination"); *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1978) (holding that reversal was required where the trial court refused to grant defendant's motion for a transcript of the first trial and the preliminary examination).[8]

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7. As we explain later, appeals are different from second or successive trials in that appeals ordinarily involve only the specific issues the defendant chooses to raise; accordingly, only the portions of the transcript that are relevant to those specific issues must be provided in the particular case.

8. Our dissenting colleague cites to *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988), for his suggestion that the *Britt* principle is ambiguous as it relates to a defendant's right to a transcript of proceedings of a prior mistrial. Dissent at 11405. He fails to report, however, that in *Kirk* there

[3] Moreover, limiting the right to a transcript of a prior mistrial to the receipt of the transcript of witnesses' testimony would be contrary to the Court's reasons for requiring the state courts to provide such transcripts. In *Griffin* and its progeny, the Court made it clear that the provision of a full transcript was necessary to ensure that indigent defendants have the same opportunity to effectively defend themselves against criminal charges as those with money to buy transcripts. *See, e.g.*, *Roberts*, 389 U.S. at 42 (1967) ("Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."). We doubt seriously that a wealthy defendant would ordinarily proceed in a subsequent trial without purchasing a full transcript of the proceedings, including, but not limited to, the parties' motions and the court rulings thereon and the opening statements and closing arguments. *Britt*, 404 U.S. at 437-38 (Douglas, J., dissenting) (stating that "wealthier

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was no dispute that the defendant was entitled to the full transcript of proceedings from his prior trial in which the jury had hung. In fact, the district court in that case granted him such a transcript "in full." *Kirk*, 844 F.2d at 662. Our statement regarding ambiguity in the application of *Britt* related only to the unique question of the obligation to provide a transcript of a trial in which the defendant had been severed as a co-defendant after two weeks. *Id.*

Our precedent, which we recognize is only persuasive authority, has established that preliminary proceedings must be provided not only to indigent defendants whose trials ended in a mistrial, but more generally to indigent defendants preparing for a first trial. Thus, in *United States v. Devlin*, 13 F.3d 1361 (9th Cir. 1994), citing *Britt*, we held that "neither fairness nor efficiency supported imposing a preliminary requirement that [the defendant] prove he had a particular need for a transcript" of a suppression hearing. *Id.* at 1365. We further stated that "courts should . . . routinely grant indigent defendants' timely requests for free transcripts of significant prior proceedings, unless a substantially equivalent alternative device is available." *Id.* Because the Government had failed to establish that a practicable alternative to the transcript existed, we found error.

defendants tend to purchase transcripts as a matter of course"); *Martin v. Rose*, 525 F.2d 111, 113 (6th Cir. 1975) ("[W]e can think of no more valuable document for defense counsel approaching a contested trial than the record of the previous trial of his client for the exact same crime with which he is charged again before the court of another sovereign. We cannot conceive of a competent lawyer for an affluent client who would not order a trial transcript under such circumstances.").

[4] Portions of the transcript, other than the testimony of witnesses, are often crucial to the preparation of an effective defense. Opening and closing arguments may provide valuable insight into the government's strategy; motions to sup-press or exclude often reveal, as here, information regarding damaging and prejudicial evidence that the state plans to introduce, and the rulings thereon may sometimes be case-dispositive. *Cf. United States v. Ash*, 413 U.S. 300, 310-311 (1973) (stating that the result of "critical confrontations" of the accused by the prosecution at "pretrial proceedings" might well "settle the accused's fate and reduce the trial itself to a mere formality") (*quoting United States v. Wade*, 388 U.S. 218, 224 (1967)). The state's contention that such portions of the proceedings need not be furnished to indigent defendants cannot be reconciled with the Court's stated purpose in establishing the right to a transcript of prior proceedings, to ensure that the defendant can prepare an "effective defense," or with its mandate that poor defendants have the same access to transcripts and other basic materials as the wealthy. *See Britt*, 404 U.S. at 227.

[5] We conclude that the Court's cases clearly establish that an indigent defendant must be provided with a transcript of prior proceedings which includes, among other things, motions and the court's rulings thereon, as well as opening statements, closing arguments, jury instructions, and relevant colloquies.[9/]

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9. The dissent states that "at least one court" has reached a decision

California law is similar. In its decision, the California Court of Appeal conceded that under California Supreme Court precedent the trial judge erred in failing to provide Kennedy with the full transcript of prior proceedings. The Court of Appeal stated that the trial court "should have provided" the "additional portions of the transcript" requested by Kennedy.

[6] Therefore, the Court of Appeal did not contend, as the state does here, that either Supreme Court or California case law provides indigent defendants with the right to witnesses' testimony only. Rather, the Court of Appeal held that the trial judge's failure to provide the indigent defendant with a full transcript of all proceedings did not require reversal because of the doctrine of "substantial compliance." Established Supreme Court law, however, does not provide a "substantial

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that Supreme Court law does not extend to providing a full transcript of prior proceedings after a mistrial and, from that, we should reach the conclusion that the law is not clearly established. For support, the dissent cites a single unpublished memorandum in which the Fourth Circuit summarily dismissed an appeal from the lower court's decision. Dissent at 11405. Outside of providing questionable precedential authority, the lower court's decision is inapplicable here. The case involved a defendant's request for portions of a transcript of prior proceedings for use *on appeal*. *See Williams v. Leeke*, 444 F. Supp. 229, 232 (D.S.C. 1976). As we discuss later, the Supreme Court has, understandably, set forth different principles for determining when due process requires the state to furnish a defendant with a full transcript on appeal. *See* discussion at 7861-62. Regardless, the Supreme Court has already debunked the dissent's formulation of AEDPA's requirements, stating that "the federal habeas court should not transform the inquiry into a subjective one by resting its determination on the simple fact that *at least one of the Nation's jurists* has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000) (emphasis added). The mere existence of conflicting authority does not mean that Federal law is not clearly established. *Id.* That the dissent misconceives the law on this point should be self-evident: If one decision reaching a different result were enough to destabilize Supreme Court precedent, then, it is not an exaggeration to suggest that no Federal law would ever be clearly established.

compliance" exception to the requirement that state courts provide a transcript of prior proceedings to indigent defendants facing a subsequent trial. Under *Britt*, it is assumed that a defendant will "ordinarily" need a complete transcript of a prior mistrial in order to present an effective defense. *Britt,* 404 U.S. at 228[10/] (declaring the transcript of a prior mistrial to be valuable to the defendant both as a discovery device in preparation for the next trial and as a tool at the trial itself for the impeachment of witnesses); *see also Roberts*, 389 U.S. at 43-44 (finding it unnecessary to discuss the importance of a preliminary hearing transcript to the defendant and holding that the transcript must be granted notwithstanding the dissent's argument that the petitioner had suggested no use to which the transcript could be put).

The state contends that *Mayer* has created an exception, similar to "substantial compliance," to the *Britt* rule that a defendant must be provided a complete transcript in order to prepare for a subsequent trial. The state's reliance on *Mayer* is in error; the exception delineated there is not applicable in the case of *second or successive trials*. *Mayer* addressed the issue whether the state must provide a defendant with a full verbatim record for use *on appeal*. The Court held that because an appellant's challenges to his conviction or sentence are limited to the specific issues raised by him in the appellate court (such as, for example, "the validity of the statute or the sufficiency of the indictment upon which conviction was predicated"), the state may show that the complete record contains extraneous material that it need not provide because it is irrelevant to the issues before the appellate court. *Mayer*, 404 U.S. at 194. Thus, on appeal, where the state meets its burden, it may provide an indigent defendant with "a record of sufficient

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10. The Court stated that serious doubts about a decision denying a request for a full transcript would arise "if it rested on petitioner's failure to specify how the transcript might have been useful to him." *Id.*

completeness" – the record that is relevant to the issues raised – rather than a complete transcript, because "part or all of the stenographic transcript . . . [is not] germane to the consideration of the appeal." *Id.* at 194-95. Because all of the proceedings from a first trial are ordinarily germane to a second trial (at least in the absence of a dismissal of some of the initial charges), the record of "sufficient completeness" exception is inapplicable. The Supreme Court acknowledged this when it failed to incorporate similar language regarding a "record of sufficient completeness" in its *Britt* opinion – an opinion filed the same day as *Mayer*.[11/]

The Court has recognized only one exception to the *Britt* requirement in the case of a second or successive trial. In *Britt*, the Court said that the state may provide an indigent defendant with an alternative device that would fulfill the same functions as a court-prepared transcript, but only after meeting its burden of establishing that the proposed alternative is sufficient. *Britt*, 404 U.S. at 230 (stating that the defendant does *not* "bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight."). The state does not contend that this exception is applicable here.[12/]

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11. Even in *Mayer*, the Court made clear that the general rule remained the same. The Court stated that a full transcript must still be provided whenever it "is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." 404 U.S. at 195. For example, a complete record may be necessary to enable a lawyer to determine what issues should be raised on appeal.

12. The Supreme Court has suggested that where, as here, "a transcript is available and could easily have been furnished," no alternatives proposed by the state will suffice. *Long*, 385 U.S. at 194-95. Since *Britt*, the Court has never approved an alternative to the provision of a complete transcript. The Eleventh Circuit has, however, allowed the state to provide a partial transcript in a case in which defendant's attorneys in the second trial had also represented him during the earlier mistrial and had "access to and

Our dissenting colleague contends that there is another exception to *Britt* in addition to the "narrow" exception discussed here. *Id.* at 227. He states that a free transcript need not be provided if it is not "necessary to an effective defense," and that for a "transcript to truly be 'necessary to an effective defense' " it need be more than "merely helpful." Dissent at 11408. He would then put the burden on the defendant to prove that there is a "need" for the transcript. The dissent's attempt to create a second exception conflicts directly with *Britt*. In *Britt*, the Supreme Court stated that a decision to deny a petitioner a transcript which rested on the "petitioner's failure to specify how the transcript might have been useful to him" would be constitutionally suspect. *Id.* at 228. It emphasized that its "cases had *consistently recognized* the value to a defendant of a transcript of prior proceedings, *without requiring a showing of need.*" *Id.* (emphasis added). In this regard, the Court cited *Roberts v. LaVallee,* in which it had granted the writ and concluded that, despite the fact that the petitioner had pointed to "*no use* to which the [preliminary hearing] transcript could have been put," the state was required to provide it. *Id.* at 228 n.3 (emphasis added). Like the California Court of Appeal, our dissenting colleague would have us abrogate clearly established Supreme Court law. This we are not free to do.

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took advantage of adequate alternatives or substitutes for the requested transcripts." *Lindsey v. Smith*, 820 F.2d 1137, 1147 n.14 (11th Cir. 1987). Contrary to the dissent's representation, the Eleventh Circuit did not "suggest" in *Lindsey* that where a defendant had access to only portions of a transcript the constitutional mandate was satisfied. *Phegley v. Greer*, 691 F.2d 306 (7th Cir. 1982), cited for the same proposition, is also inapplicable. *Id.* at 309. The Seventh Circuit held only that where the state routinely does not transcribe preliminary hearings, alternatives to a transcript – such as the presence of trial counsel at the hearing – may suffice under the *Britt* exception (which is not applicable here, *see* text *supra*).

IV

Having identified clearly established Supreme Court law, we must next decide whether the California Court of Appeal's decision is contrary to or an unreasonable application of that law. When determining whether a decision is either "contrary to" or an "unreasonable application" of AEDPA, the habeas court must examine the last reasoned decision by the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-02 (1991). In this case, the California Supreme Court summarily denied review of Kennedy's claim, so the last reasoned state court decision is the California Court of Appeal decision on direct appeal.

[7] In reaching its decision, the Court of Appeal relied on *People v. Hosner*, 15 Cal.3d 60 (1975), which adopted, in sum and substance, the applicable Supreme Court precedents, including *Britt*, and which held that "an indigent defendant in a criminal trial who was entitled to a free transcript of a prior mistrial was *presumptively* entitled to a *full* transcript of those prior proceedings." *Id.* at 70 (citing *Britt*, 404 US. at 227) (emphasis in original). As discussed, applying *Hosner*, the California Court of Appeal concluded that the trial court should have provided Kennedy with a full transcript. If the Court had stopped its analysis here, the determination on the merits would *not* have been contrary to clearly established Supreme Court law.

[8] The California Court of Appeal, however, went on to reject Kennedy's constitutional claim on the basis that in providing Kennedy with only a transcript "of the [trial] testimony, the [trial] court substantially complied" with *Hosner*. In so doing, the state court added an additional factor to the Supreme Court rule, and thus its decision was contrary to clearly established Supreme Court law. The alteration of the existing Supreme Court requirements through the addition of the "substantial compliance" doctrine contravened controlling

precedent, which requires the state to provide an indigent defendant with a full transcript of the prior proceedings for use in a subsequent trial. *Britt,* 404 U.S. at 227. In sum, because the California Court of Appeal created a new and additional "substantial compliance" exception to the governing Supreme Court rule, and thereby altered or amended the well-established Supreme Court requirement that indigent defendants be provided with a complete transcript of the "prior proceedings," we hold that the state court's decision was contrary to clearly established law. *See Williams v. Taylor,* 529 U.S. 362, 393, 397 (2000) (holding that where the State Supreme Court "mischaracterized at best" the governing rule and read a "separate inquiry" into the established Supreme Court *Strickland* ineffective assistance standard, the writ must be granted); *Benn v. Lambert*, 283 F.3d 1040, 1051, n.5 (9th Cir. 2002) ("The addition, deletion, or alteration of a factor in a test established by the Supreme Court [ ] constitutes a failure to apply controlling Supreme Court law under the 'contrary to' clause of AEDPA.").[13/]

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13. Were we to conclude that the state court's determination was not contrary to clearly established Supreme Court precedent because we believed that the application of a substantial compliance test does not add an additional factor to the controlling Supreme Court standard, we would be compelled to conclude that the California Court of Appeal decision constitutes an objectively unreasonable application of clearly established Supreme Court law. *See Williams*, 529 U.S. at 409. To approve the omission of transcripts of critical portions of the proceedings, such as the opening statements and closing arguments, and the motions, hearings and rulings relating to the suppression or exclusion of prejudicial evidence, would constitute an objectively unreasonable application of *Britt* and the related cases, first, because the material omitted, especially the motion and ruling regarding "gang" evidence and the opening and closing arguments, pertained to important aspects of the proceedings, *Roberts*, 389 U.S. at 41 (holding that defendant must be provided with preliminary hearing transcript at which "major state witnesses" testified), and, second, because the prosecution failed to carry its burden of justifying such omissions. *See Gardner*, 393 U.S. at 370 (holding in favor of indigent defendant who requested a transcript of his habeas corpus proceedings and stating that the

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Where the state completely fails to provide an indigent defendant with a transcript of a mistrial for use in connection with a second trial, we would likely find a structural error, requiring automatic reversal. *See Turner v. Malley*, 613 F.2d 264, 266 (10th Cir. 1979) (holding that *Britt* requires automatic reversal where the state fails entirely to provide the defendant with a transcript for use at the second trial and also fails to show the existence of an alternative device that would fulfill the same functions as the transcript); *Martin*, 525 F.2d at 113 (same); *United States v. Pulido*, 879 F.2d 1255, 1257 (5th Cir. 1989) (same); *United States v. Talbert*, 706 F.2d 464, 470 (4th Cir. 1983) (same); *see also Roberts*, 389 U.S. at 43 (reversing the state conviction, granting the writ, and failing to adopt the dissent's suggestion that a separate harm-less error analysis should be conducted where the state failed to provide the indigent defendant with a transcript of a preliminary hearing for use at trial). Where the state fails to provide only a portion of the transcript, however, we conclude that harmless error analysis applies. *Cf. United States v. Devlin*, 13 F.3d 1361, 1364-65 (9th Cir. 1994) (applying harmless error where the trial court failed to provide the defendant with a transcript of a suppression hearing conducted prior to trial); *United States v. Rosales-Lopez,* 617 F.2d 1349, 1355 (9th Cir. 1980) (same). We note, however, that where significant and crucial portions of the proceedings of a first trial are omitted, it will generally be

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state failed to show the existence of an adequate substitute for a full transcript); *Eskridge v. Washington Bd. of Prison Terms and Paroles*, 357 U.S. 214, 215-16 (1958) (per curiam) (holding in favor of indigent defendant and stating that the state failed to show availability of trial notes to substitute for a full transcript); *Hosner*, 15 Cal.3d at 66 (holding that the state must overcome the presumption that the defendant is entitled to a complete transcript of the prior trial and meet its burden of showing that an adequate substitute is available at the hearing in the trial court in which the transcript is requested).

prejudicial to an indigent defendant's ability to prepare an effective defense. *See, e.g., Roberts,* 389 U.S. at 43 (holding that the failure to provide defendant with preliminary hearing transcript at which key state witnesses testified was constitutional error requiring reversal). The more significant and crucial the portions of the proceedings omitted, the more likely that we will be compelled to conclude that the defendant was deprived of the "basic tools of an adequate defense."[14/] *Britt*, 404 U.S. at 227.

In making a harmless error determination in a habeas case, "normally a record review will permit a judge to make up his or her mind about the matter. And indeed a judge has an obligation to do so." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). When reviewing a state court decision to determine "whether the error had a substantial and injurious influence or effect on the verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993), a judge should "ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' " *O'Neal,* 513 U.S. at 436-37. Further, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had a substantial and injurious effect or influence on the jury's verdict, that error is not harmless. And, the petitioner must win." *Id.* at 436 (quotations omitted). These principles apply in post-AEDPA as well as pre-AEDPA cases. *Early v. Packer*, 537 U.S. 3, 10 (2003); *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

[10] Upon review of the record, we conclude that the state court's denial of a complete transcript of prior proceedings had a substantial and injurious effect on the jury's verdict.[15/] *Brecht*,

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14. At the other end of the spectrum, we would be unlikely to find that a failure to provide insignificant and inconsequential portions of the proceedings would result in reversible error.

15. The dissent would have us forfeit petitioner's constitutional

claim on the ground that counsel we appointed on appeal failed to argue adequately the prejudicial effect of the state's constitutional failure to provide the portions of the transcript that it omitted. Our dissenting colleague does not deny that the question of prejudice was presented adequately throughout the state court proceedings and even in the district court where the petitioner represented himself. The issue of course pertains to the prosecution's failure to provide the portion of the transcript relating to its first effort to insert the gang membership issue into the trial in order to inflame the jury and prejudice it against petitioner.

In the state court of appeals, defense counsel argued in his brief that "prejudice from the lack of a complete transcript is demonstrated by the fact defense counsel was obviously unaware of [the prior judge's] ruling during the first trial that the prosecution witnesses were not to refer in any way to appellant's gang membership. As a result on retrial, defense counsel failed to secure a ruling prohibiting the prosecution from [testifying to] gang membership and terminology in front of the jury." Counsel also asserted that "during the first trial, without the inflammatory evidence, the People were unable to persuade the jury of appellant's guilt. By introducing irrelevant and unduly prejudicial evidence, the prosecution essentially assured the trial jury would be inflamed against appellant and convict him." The Court of Appeal opinion considered and ruled on this contention.

Similarly, in the district court, Kennedy, proceeding *pro se*, objected to the magistrate judge's findings and recommendations arguing that a transcript of the first trial would have aided defense counsel by alerting him to make a motion to exclude the gang evidence. He further asserted that the introduction of such evidence was prejudicial and inflammatory. Despite these objections, the district judge upheld the findings and recommendations and certified both the question of whether Kennedy's "right" had been violated as a result of the failure to provide the requested portions of the full transcript and whether the error was harmless.

In his brief to this court, court-appointed counsel argued that the failure to provide the omitted portions of the transcript constituted structural error. The state disagreed. Both parties, however, proceeded at all times from the factual basis provided by the record, i.e., that the material requested by Kennedy and omitted by the state related to gang member-ship and the suppression hearing in that regard (as well as the opening and closing statements). Because we rejected petitioner's structural error argument, the question we must necessarily answer once a constitutional violation is found is whether the error was harmless. We are obligated to conduct that review on the basis of the "record as a whole." *See Brecht*, 507 U.S. at 638; *Murtishaw v. Woodford*, 255 F.3d 926, 973 (9th Cir. 2001) (stating that the

507 U.S. at 627. The prosecution took advantage of Kennedy's counsel's lack of knowledge regarding the prior trial court order prohibiting gang testimony in order to introduce the prejudicial testimony in the second trial; the state conceded as much during oral argument. The transcript of the trial testimony provided to the defense was devoid of any mention of gang involvement, gang language, or of a witness who would testify to the connection between the two. However, had Kennedy's counsel had access to the missing portions of the transcript of the proceedings – which portions included the discussions regarding the introduction of gang related evidence, the motion to exclude, and the judge's favorable ruling thereon – we have little doubt

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inquiry is whether "in light of the record as a whole," the error had a substantial and injurious effect or influence in determining the verdict and conducting a review of the record before granting the petition); *see also Bartlett v. Alameida*, ___ F.3d ___1020, 2004 WL 1043351(9th Cir. 2004) (conducting harmless error review under *Brecht* based on record presented in habeas case); *Taylor v. Maddox*, ___ F.3d ___, 2004 WL 1043343 (9th Cir. 2004) (stating that under *Brecht* the court "must review the evidence at trial" to determine whether on habeas the constitutional error was harmless); *Jackson v. Giurbino*, 364 F.3d 1002, 1010 (9th Cir. 2004) (conducting harmless error review under *Brecht* based on record presented in habeas case); *cf. United States v. Galindo,* 913 F.2d 777, 779 (9th Cir. 1990) (stating that after conducting "a careful review of the record in this case," the error was harmless).

It is helpful when counsel we appoint are familiar with the record and capable of aiding us in our review. That is, unfortunately, not always the case. Nevertheless counsel's failure does not relieve us of our obligation to determine whether the constitutional error that petitioner has established warrants relief. However, wholly aside from that obligation, we may review an issue that is not properly raised, if the failure to raise it does not prejudice the opposing party. *See, e.g., United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). Here, neither the state nor our dissenting colleague could have been surpri sed that the question whether the state's failure to provide the transcript was harmless consisted of the identical question that had been litigated in the state and federal courts throughout the proceedings, i.e. the omission of the suppression hearing relating to the gang membership testimony. Nor could anyone have been prejudiced in any way by defense counsel's failure to address the prejudice question more directly.

that Kennedy's counsel in the second trial would have presented a similar motion with a substantial likelihood of success.[16]

After hearing arguments from counsel, the first trial judge made a determination that the introduction of evidence tending to show gang affiliation on the part of Kennedy would be highly prejudicial. The case law in this circuit provides ample support for that conclusion and for the conclusion that the failure to provide Kennedy with the portion of the transcript relating to that evidentiary issue, and the consequent introduction in the second trial of the gang related evidence, was prejudicial. Our cases make it clear that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error. Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability. *See Mitchell v. Prunty*, 107 F.3d 1337, 1342-43 (9th Cir. 1997), *cert. denied*, 522 U.S. 913 (1997) (reversing the conviction and holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an "evil person," that is not enough to make him guilty under California law), *overruled*

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16. Had new counsel had access to the pre-trial proceedings, he would undoubtedly have based a motion to exclude on the arguments already presented and on the prior judge's ruling in favor of the defendant. Our conclusion that the second judge would likely have followed the first judge's order is supported by the law-of-the case doctrine, which expresses the general practice of courts "to refuse to reopen what has been decided" in a prior stage of the proceedings in the same case. *Messinger v. Adams*, 225 U.S. 436, 444 (1912). Although we have found no California cases addressing the exact issue presented here, generally "under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997). A second judge will generally follow a ruling made by an earlier judge unless the prior decision was erroneous, is no longer sound, or would create an injustice. *Id.* None of the exceptions to the application of this basic doctrine exists here.

on other grounds by Santamaria v. Horsley, 133 F.3d 1242, 1248 (9th Cir. 1998); *see also United States v. Garcia*, 151 F.3d 1243, 1244-46 (9th Cir. 1998) (reversing the conviction and stating that it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members). In this regard, we have stated that testimony regarding gang membership "creates a risk that the jury will [probably] equate gang membership with the charged crimes." *United States v. Hankey*, 203 F.3d 1160, 1170 (9th Cir. 2000) (internal quotations and citations omitted). We further stated that where, as here, "gang" evidence is proffered to prove a substantive element of the crime (and not for impeachment purposes), it would likely be "unduly prejudicial." *Id.* In sum, the use of gang membership evidence to imply "guilt by association" is impermissible and prejudicial. *Garcia*, 151 F.3d at 1246.

Here, the prosecution, well aware that the first trial court had forbidden the introduction of testimony relating to gang involvement or association in order to establish defendant's guilt, deliberately elicited testimony from Detective McDowell for this purpose.[17/] We conclude that the jurors in Kennedy's case most likely drew impermissible inferences from Detective McDowell's testimony, equating Kennedy's purported gang membership with the charged crime. The fact that the first trial ended in a hung jury and that, following a one day trial, the jury in the second trial deliberated for three days before reaching a verdict, also supports our determination that the refusal to provide Kennedy with a complete transcript had a substantial and injurious effect on the jury's decision.[18/] In sum, had a

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17. Because the jury during its three-day long deliberation, asked that the court reporter read Detective McDowell's testimony back to them, the jurors heard the impermissible evidence of gang affiliation twice.

18. From the fact that the first trial ended in a mistrial, as well as the fact that the jury deliberated for a considerable amount of time in the

transcript containing the missing portions of the proceedings, including the motion to exclude gang related testimony and the court's favorable ruling thereon, been furnished to the defense, it would have served as precisely the type of "discovery device in preparation for [the second] trial" that *Britt* referred to when explaining why it is necessary to provide the defense with a transcript of the proceedings.[19] 404 U.S. at 228.

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second trial, we infer that the question as to Kennedy's guilt or innocence was a close one in both trials. That the jury did not find the evidence in the case against Kennedy overwhelming in either the first or second trial makes it even more difficult to draw the conclusion that prejudicial gang testimony, which the jury heard on two separate occasions in the second trial (once during trial and once during its deliberations), was not a substantial factor that tipped the scales against the defendant the second time. *See Murtishaw v. Woodford*, 255 F.3d 926, 974 (9th Cir. 2001) (granting the writ because "given the mitigating evidence presented, the jury's apparent interest in it, and the length of the jury's deliberations, [the court was] in 'grave doubt' about whether the jury would have returned a death sentence"); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (stating that "longer jury deliberations 'weigh against a finding of harmless error [because] lengthy deliberations suggest a difficult case" and holding that admission of possibly prejudicial evidence required reversal of defendant's conviction where the four-day jury deliberations were "relatively lengthy" for a two-count drug case) (internal citations omitted); *United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer jury deliberations "weigh against a finding of harmless error [because] lengthy deliberations suggest a difficult case"); *Dallago v. United States*, 427 F.2d 546, 559 (D.C. Cir. 1969) ("The jury did one would expect that if the evidence of guilt was over-whelming the jury would have succumbed much sooner").

19. The dissent's argument that defense counsel's failure to object after the jury heard the gang testimony breaks the "chain of causation," Dissent at 11418, is based on a faulty premise, namely that an objection would have eliminated the prejudicial testimony from the record or, at the least, from the jurors' memories. Neither assumption is correct. *Cf. Thompson v. Borg*, 74 F.3d 1571, 1581 (9th Cir. 1996) (stating that timely instruction does not cure prejudicial impact of evidence if information is highly prejudicial); *Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988) (stating that where statements concern a defendant's prior criminal behavior,

[11] We note that the prejudice in this case stemmed not only from the failure to provide Kennedy with the portion of the proceedings relating to the exclusion of gang related evidence, but also from the omission of other portions of the transcript. We consider at this point only the opening statements and the closing arguments from the first trial. The statements and arguments, which Kennedy explicitly requested but was denied, were also crucial to the development of an effective defense. Various tactical and strategic decisions made by Kennedy's new counsel might have been affected had he been provided with a copy of the prosecutor's opening statement and closing argument; he might, for example, have been able to anticipate some of the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight that the prosecution would place on various items of evidence, and

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the efficacy of jury instructions is subject to serious doubt); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986) ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities"); *see also Bruton v. United States*, 391 U.S. 123, 126 (1968) ("The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (Jackson, J., concurring). It is likely that counsel concluded that an objection to testimony suggesting petitioner's gang membership would have made matters worse by calling further attention to the prejudicial disclosure. This is particularly so because defense counsel was unprepared to present an effective argument for inadmissibility having, as a result of the constitutional violation, been entirely surprised by the prosecutor's questioning and the witness's response. Moreover, it is pure speculation at this point as to whether any admonition would have been adequate to cure the prejudice to the defendant. *Thompson*, 74 F.3d at 1581; *see also Lewis*, 787 F.2d at 1323 (reversing where prosecution's evidence against the defendant was "weak" and jury instructions were inadequate to cure doubts regarding the prejudicial effect of evidence admitted and prosecutor's statements).

better determine what would be needed to refute them. As the California Supreme Court itself has explained, as "in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." *Hosner*, 15 Cal.3d at 70. In hindsight, it is difficult to conclude that the omitted portions of the transcript would not have been important to Kennedy in preparing an effective defense, particularly where, as here, the prosecutor had a distinct advantage in presenting the government's case, having been present when the defense delivered its opening and closing arguments and throughout all of the proceedings both before and during the first trial.[20] *See Devlin*, 13 F.3d at 1364 (stating

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20. Our dissenting colleague once again appears to enjoy playing numbers games in a desire to prove that the judicial system is flawed because a single district judge may declare an enactment unconstitutional, *see Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997), or because less than a unanimous court may decide a case. Remarkably, he devotes a full section of his dissent to complaining about such conduct by the court which is such a source of "embarrassment" to him, Dissent at 7893, and of which he involuntarily remains a member, *see* Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit* (April 7, 2004). It is partly on this basis that, as he so inelegantly puts it, he "lamentably" dissents. Dissent at 7893.

Our colleague is also struck by the fact that in this habeas case we are reversing both the state court and the district court. A brief review of habeas law, including cases in which he participated, would have informed him that when a habeas case is reversed in any court of appeal, whether it be the Fourth Circuit, the Fifth Circuit, or the Ninth Circuit, it is ordinarily because the court of appeal is reversing both the state court and the district court (although in a minority of cases it may be affirming the latter). *See, e.g.*, *Hiley v. Thompson*, 336 F.3d 848 (9th Cir. 2003) (granting the writ and in so doing reversing the state court of appeals, supreme court, and district court) (O'Scannlain, J., joining in the opinion and judgment); *Allen v. Lee*, ___ F.3d ___, 2004 WL 905822 (4th Cir. 2004) (divided en banc court

that the transcript should have been provided to "place the defendant on equal footing with the prosecution"). For these reasons, we hold that denying Kennedy a full transcript of the proceedings for use in relation to his second trial was not harmless error.

We REVERSE the district court's denial of the petition for writ of habeas corpus and REMAND the matter for issuance of the writ.

FISHER, Circuit Judge, concurring:

I fully concur in the majority opinion, but want to respond specifically to the dissent's suggestion that our conclusion that there was prejudice results from "lawyering from the bench."

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granting the writ and in so doing reversing the state court of appeals, supreme court, and district court); *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004) (granting the writ and in so doing reversing the state courts and district court). In any event, sometimes even the Supreme Court reverses a decision made by a large number of judges, even a large number of federal court of appeals judges, and is not embarrassed to do so when it concludes that such is its constitutional duty. *See Vacco v. Quill*, 521 U.S. 793 (1997) and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (reversing eight federal court of appeals judges sitting en banc and three others who reached a similar result). It does so in habeas cases as well. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003) (granting the writ and in so doing reversing state trial court, court of appeal, and supreme court; and Fourth Circuit); *Williams v. Taylor*, 529 U.S. 362 (2000) (granting the writ and in so doing reversing the Virginia Supreme Court and a unanimous panel of the Fourth Circuit). Moreover, as would surprise no one with the slightest familiarity with Supreme Court decisions, that the Court reverses even in habeas cases when its view is not shared by all of its members. *See Williams*, 539 U.S. at 400 (Scalia, J., dissenting; Thomas, J., joining in the dissent); *Williams*, 529 U.S. at 418 (Rehnquist, C.J., dissenting in part; Thomas, J., and Scalia, J., joining in the dissent). Surely, the two judges on this panel, whose actions our dissenting colleague so harshly castigates need act no differently.

The dissent seems to forget that this habeas appeal arises from a criminal case in which the constitutional right of the defendant to a fair trial is the issue, not just "litigation" in which someone wins or loses according to his lawyer's skill, or lack of it. As such, the court's pursuit of the issue of prejudice with the state's attorney – charged with upholding the fairness of the criminal justice system in the course of prosecuting defendants – was not lawyering; it was judging.

> Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may – indeed, must – do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. As Justice Douglas once warned, "the function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993).

The issue of prejudice was not some hidden, esoteric legal point the parties or the court was unaware of – indeed, the trial judge in the first trial had addressed the highly prejudicial nature of "gang" testimony and precluded the very kind of questioning the state introduced at the second trial. Even had there been no oral argument in this case, the record and written arguments before the court were quite sufficient for us to evaluate the issue of prejudice and any question of waiver. Oral argument – as this court routinely makes clear to counsel – is an opportunity for the court to ask questions, often to give counsel a chance to address a particular judge's tentative conclusions to clarify or

even persuade the judge to change his or her mind. Thus the notion that because defendant's appointed counsel could not – for whatever reason – identify one fairly obvious instance of possible prejudice (one the initial state trial judge recognized and made part of the record) "should have ended this matter" is just wrong, if by that the dissent means we as judges must have turned a blind eye to the record and common sense.

As Judge Posner put it – himself borrowing from a lawyer's famous observation – "Judges, by the way, are not wallflowers or potted plants." *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988). Or as another of his colleagues observed: "While a judge should never engage in advocacy from the bench, he or she has an obligation to raise legal issues that the parties have overlooked or neglected.... The judge should take an active role, when necessary, to ensure fairness and to conform the proceedings to the law." *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996). The questions posed to counsel, and the majority opinion which I join, are in furtherance of that proper judicial role.

O'SCANNLAIN, Circuit Judge, dissenting:

This case represents a triumph of lawyering from the bench. While I share some of the court's evident sympathy for the defendant – whose third strike resulted from the sale of less than one-tenth of one gram of a *legal* substance to an undercover officer[1/] –I respectfully dissent from its decision to step into

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1. Pursuant to California Health and Safety Code § 11355, "Every person who . . . offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any . . . liquid, substance, or material in lieu of a[ ] controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison." As a "wobbler" – an offense that can be punished as either a felony or misdemeanor, *see Lockyer v. Andrade*, 538 U.S. 63, 67 (2003) – sale of a substance in lieu of a controlled substance can (as in this case) lead a

counsel's shoes and tango its way around the deference we owe to state courts as coordinate expositors of federal law.

I

There is no dispute that Kennedy was entitled to some portion of the transcript from his first trial on these charges. *See generally Britt v. North Carolina*, 404 U.S. 226 (1971). The only issue before the court is whether *clearly established* Supreme Court precedent requires the State to have provided him with a complete transcript, *including opening and closing arguments and a recounting of any preliminary trial motions*. The majority cites no Supreme Court case that extends *Britt* beyond a requirement that a transcript of all *testimonial* evidence adduced in prior proceedings be made available to indigent defendants; it finds its clearly established Supreme Court precedent not in the *U.S. Reports*, but in *Black's Law Dictionary*. Opinion at 7855, 7857.

If this were a direct criminal appeal, I might not necessarily disagree with the court's interpretation of *Britt*. But on collateral review, our job is not to divine the *best* interpretation of an admittedly *vague* Supreme Court precedent, *see United States v. Kirk*, 844 F.2d 660, 662 (9th Cir. 1988) ("The right to free transcripts is not absolute. The Court in *Britt* recognized that the 'outer limits of that principle are not clear.' ") (quoting

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recidivist to be sentenced to twenty-five years to life under California's Three Strikes Law, Cal. Penal Code §§ 667(e) & 1170.12(c)(2).

Kennedy's prior offenses included disorderly conduct, theft, burglary, battery, and forcible rape; numerous parole violations followed his nine-year incarceration in state prison for the latter offense. *Cf. Ramirez v. Castro*, 365 F.3d 755, 767-69 (9th Cir. 2004) (declaring unconstitutional the imposition of a three-strikes twenty-five-to-life sentence on a recidivist whose prior history consisted only of three non-violent shoplifting offenses and who previously had served just six months and 20 days in county jail).

Britt, 404 U.S. at 227)),[2/] but to determine whether the state court's result in this case reflected an *objectively reasonable* interpretation of an unmistakably *clear* Supreme Court decision. At least one court has held that the relevant Supreme Court case law does not extend so far as the majority would take it, and given our acknowledgment of *Britt*'s fuzzy contours, I have difficulty concluding that the state court's decision unreasonably interpreted clearly established federal law within the meaning of AEDPA. *See Williams v. Leeke*, 444 F. Supp. 229, 232 (D.S.C. 1976), *aff'd per unpublished memorandum* 571 F.2d 579 (4th Cir. 1978) ("The authorities cited by petitioners to support their contention that the Constitution requires them to obtain a transcript of closing arguments do not recognize such a requirement. A transcript of arguments to a jury is omitted from the requirements set out in *Hardy v. United States*, 375 U.S. 277 (1964), and *Britt v. North Carolina*, 404 U.S. 226 (1971), and *Herring v. New York*, 422 U.S. 853 (1975), make no reference to the reduction of argument to the jury into transcript form.") (citations edited); *see also Price v. Vincent*, 538 U.S.

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2. The majority suggests that *Kirk*'s reference to *Britt*'s *own* recognition of its ambiguity is limited to the facts of *Kirk*. Opinion at 7857 n.8. Aside from the weakness of such a proposition, I note that while *Kirk* surely addressed a distinguishable factual scenario, no fair reading of the quoted passage – which opened the court's analysis of *Britt* and its progeny – supports such a limited interpretation. For the sake of ease, I here quote the *Kirk* passage in full:

> The Supreme Court has held that a state 'must, as a matter of equal protection, provide indigent prisoners with the *basic tools of an adequate defense* or appeal, when those tools are available for a price to other prisoners.' *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 92 S. Ct. 431 (1971) (emphasis added). However, the right to free transcripts is not absolute. The Court in *Britt* recognized that the 'outer limits of that principle are not clear.' *Id.*

The Court, quite simply, has never clearly held that a transcript of pre-mistrial motions are "basic tools of an adequate defense" – that is, that they fall within the admittedly "not clear . . . outer limits" of its doctrine.

634, 643 (2003) ("This was not an *objectively unreasonable* application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find [constitutional] violations under similar circumstances.") (emphasis in original).

The court's castigation of the state tribunal for its creation of a "doctrine of 'substantial compliance' " presents a red herring. *See* Opinion at 7860. *Britt* itself fails to set forth a rigid requirement that defendants be provided with a transcript in every case, but rather establishes its own rule of substantial compliance – demanding delivery of a free transcript only when doing so "is necessary for an effective defense," *Britt*, 404 U.S. at 227, and failing to find a constitutional violation where a "substantially equivalent" device is available. *Id.* at 230. Read in the charitable light demanded by AEDPA, *see Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003) (noting AEDPA's demand that courts must "presume . . . that state courts know and follow the law and give state court decisions the benefit of the doubt.") (citation and quotations omitted), the state court's reference to "substantial compliance" hardly "created a new and additional . . . exception" to established Supreme Court doctrine. *Contra* Opinion at 7864. It simply represents the Court of Appeal's eminently reasonable conclusion that the partial transcript delivered to Kennedy satisfied *Britt*'s requirement that indigent defendants be given free access to only those portions of a transcript which are necessary to ground a constitutionally competent defense.

Indeed, the following two sentences of the Court of Appeal's opinion confirm that is precisely what was meant by its allusion to substantial compliance: "Kennedy was afforded a free transcript of all the testimony. He thus had available those crucial portions which might be necessary . . . for the purposes of impeaching witnesses and rebutting evidence." *Kennedy v. Terhune*, No. D027718 at 6 (Cal. Ct. App. filed Sep. 8, 1998).

Nonetheless, the majority once again faults the state appellate court's reaching the same conclusion that at least one of our sister circuits has suggested. *See Phegley v. Greer*, 691 F.2d 306, 309 (7th Cir. 1982) ("Due process does not always require the state to provide a full transcript to an indigent defendant *if a partial transcript* or appropriate substitute is made available.") (emphasis added), *cert. denied* 459 U.S. 946 (1982); *see also Lindsey v. Smith*, 820 F.2d 1137, 1148 (11th Cir. 1987), *cert. denied* 489 U.S. 1059 (1989) ("Moreover, in contrast to *Britt*, appellant's attorneys had access *to portions of the actual transcripts* of the first trial.").

The majority's only cogent critique of the Court of Appeal's conclusion that Kennedy had all he needed to prepare a constitutionally effective defense is its vague assertion that "motions to suppress or exclude often reveal, as here, information regarding damaging and prejudicial evidence that the state plans to introduce, and the rulings thereon may sometimes be case-dispositive." Opinion at 7859. But there are two serious problems with this conclusory reasoning. First, the majority utterly fails to explain why such evidence cannot be adequately and effectively dealt with by contemporaneous objection when it is encountered in the courtroom.[3/] For a

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3. The majority's suggestion that an objection would have been ineffectual because it may not have removed the prejudicial testimony from the jurors' minds, Opinion at 7872 n.19, not only contradicts case law establishing that jurors are generally presumed to follow the instructions of the court, *see, e.g.*, *United States v. Griffith*, 301 F.3d 880, 884 n.3 (8th Cir. 2002) ("The district court instructed the jury that the statements and comments of the prosecutor are not evidence. Because jurors are presumed to follow their instructions, this provides further evidence that Griffith suffered no prejudice as a result of the prosecutor's allegedly improper remarks.") (citation omitted); *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997) ("Within wide margins, the potential for prejudice stemming from improper testimony can be satisfactorily dispelled by appropriate curative instructions. Jurors are presumed to follow such instructions, except in extreme cases.") (citations, quotations, and alterations omitted); *United*

complete transcript truly to be "*necessary* to an effective defense," *Britt*, 404 U.S. at 227 (emphasis added), it must be more than merely *helpful*. *See Webster's Third New Int'l Dictionary* 1510-11 (1986) (defining necessary as "of, relating to, or having the character of something that is logically required . . . that cannot be done without; that must be done or had; absolutely required; essential, indispensable."); *cf.* Opinion at 7855 ("In asking this court to limit the meaning of 'prior proceedings' to a transcript of witness testimony, the state would have us construe the term so as to violate its ordinary and plain meaning. We are not free to do so."). At bottom, the majority offers only a thinly-reasoned justification to support its extension of precedent beyond that clearly established by the Supreme Court.[4/]

Second, the majority entirely overlooks the fact that–as a constitutional matter–the admission of prejudicial evidence generates reversible error only when it "renders the trial

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States v. Bullock, 71 F.3d 171, 175 (5th Cir. 1995) ("The court admonished the jury that it could consider Bullock's prior felony conviction only in connection with the firearm count. Any possible prejudice could be cured with proper instructions and juries are presumed to follow their instructions. Therefore, the jury instructions were sufficient to cure any possible prejudice."), but also case law demonstrating precisely how effective objections and instructions can be. *See infra* at 7890 (collecting cases).

4. Contrary to the majority's assertion, I do not "put the burden on the defendant to prove that there is a 'need' for the transcript" tailored to the particular facts of his case. Opinion at 7863. That might indeed create tension with *Britt*'s holding that a trial court may not base its denial of a petitioner's request for a transcript on his failure to show "*particularized* need." *Britt*, 404 U.S. at 228 (emphasis added). Instead, I place the burden on the *majority* to justify *its* novel articulation of a thin rationale supporting the extension of prior precedent in order to impose a general requirement that indigents must be given a transcript of all non-testimonial preliminary proceedings; and to demonstrate that the state court objectively unreasonably concluded that, as a general matter, delivery of a partial transcript recording all testimony enables a constitutionally-effective defense.

fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). Thus, whatever value there may be in securing the exclusion of potentially prejudicial evidence from the courtroom prior to the commencement of trial, the fact that the courts subject the ultimate admission of prejudicial evidence to such a stringent standard of review evinces a constitutionalized conclusion that excluding such evidence by pre-trial motion is hardly necessary to securing a fair trial or guaranteeing a constitutionally effective defense. Otherwise, the courts long ago would have established a per se rule of ineffectiveness for failure to object to the admission of prejudicial statements at trial. Yet we have soundly rejected that proposition. *See, e.g.*, *Phyle v. Leapley*, 66 F.3d 154 (8th Cir. 1995) ("[Due to] the kinds of broad, highly subjective factors that trial lawyers must take into account as they make repeated, instantaneous decisions whether to object to a question, whether to move to strike a damaging unresponsive answer, or whether to move for a mistrial when a witness has delivered an unexpected low blow[,] [w]hen we review such trial decisions, the ineffective assistance standard is high – they are 'virtually unchallengeable' – in part because appellate judges cannot recreate from a cold transcript the courtroom dynamics that are an essential part of evaluating the effectiveness of counsel's performance.") (quoting 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* §§ 11.10, at 95 (1984)).

Viewed in this light, the state court's decision rejecting Kennedy's assertion of *Britt* error was neither contrary to, nor an unreasonable application of, clearly established federal law as set forth by the Supreme Court.

II

Even if it were objectively unreasonable for the state Court of Appeal to have concluded that a transcript of prior pretrial

motions was not "needed for an effective defense"–which is was not–it was not objectively unreasonable for the Court of Appeal to have concluded that any resulting constitutional error was harmless.

A

Notwithstanding more than twenty years of Ninth Circuit jurisprudence making clear that *Britt* errors are subject to harmless error review, *see, e.g.*, *United States v. Rosales-Lopez*, 617 F.2d 1349, 1355-56 (9th Cir. 1980), and despite the fact that the Certificate of Appealability issued by the district court directed Kennedy to address "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of Petitioner's rights *and whether it was harmless error*," petitioner's opening brief failed to allege that any prejudice stemmed from the trial court's refusal to provide him a complete transcript, asserting instead that no such showing was necessary. *See Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("Arguments not raised in opening brief are waived.").

Even after the state's responsive brief conclusively demonstrated that his claim was subject to harmlessness review, Kennedy did not suggest that he was in any way prejudiced until the final sentence of his reply brief. *See Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); *see also Sophanthavong v. Palmateer*, 365 F.3d 726, 737 (9th Cir. 2004) (noting the "obvious" prejudice wrought by allowing litigants to raise arguments for the first time in reply: doing so deprives opposing counsel of "the opportunity to point to the record to show that the new theory lacks legal or factual support").[5/] Yet even then

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5. The majority's suggestion that no one could "have been prejudiced in any way by defense counsel's failure to address the prejudice

he was unable to identify any specific reason why counsel's lack of access to a complete transcript affected the outcome of his second trial. *Cf. United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989) ("The second reason that appellant's claim fails is that [he] has not pointed to any specific prejudice he has suffered from the alleged errors in the transcripts . . . . [Even assuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice.").

It is particularly curious that the majority seeks to escape Kennedy's waiver by pointing to the state's alleged factual concessions at oral argument. *See* Opinion at 7869. Let's have a look at what actually happened at the oral argument. Recognizing that we long have held *Britt* error subject to harmlessness review, the court had repeatedly prodded petitioner's counsel to identify some plausible instance of actual prejudice stemming from the trial court's failure to furnish his client a transcript of the pre-mistrial motions. The majority's final exchange with Kennedy's counsel during his opening argument is most illuminating:

> [Counsel for Kennedy]: . . . If the new counsel had had [a complete transcript], he would be much-better equipped.
>
> [Court]: Well, that's true. I mean, I think one can assume that the–more information is better than no information, or some information. So let's accept that premise. Is there anything you can point to that occurred in the second trial–there was a mistrial on the first one, right?
>
> [Counsel for Kennedy]: Yes.

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question more directly," Opinion at 7869 n. 15, thus flatly contradicts our court's well-established–and just recently restated–understanding of how a party's failure adequately to brief an issue prejudices the opposing party.

[Court]: Okay. So in the second trial, was there something that you can point to where it's clear that, had [petitioner] had the full trial transcript, he would have avoided some prejudicial episode?

[Counsel for Kennedy]: ***Not as I stand here.*** But I will say–

[Court]: Well then maybe you should sit down for a while, and on rebuttal maybe you can figure out your case.

That highlighted admission–following a ten second silence during which counsel searched in vain for some answer to the court's question–should have ended this matter. Aware that, beyond having waived it in the briefs, Kennedy's counsel had thus conceded the critical argument in this litigation, counsel for the State rose with the intention of only briefly addressing the court. In remarks lasting just 30 seconds, counsel noted that we long have held that *Britt* error is subject to harmless error review, and that petitioner had failed to identify any prejudice. The following exchange with the majority ensued:

[Counsel for the State]: Unless the court has any questions, I–I believe that there's . . .

[Court]: Yes. I have a question.

[Counsel for the State]: Yes, your honor.

[Court]: Umm. . . There was gang testimony at the second trial and not at the first. Right?

[Counsel for the State]: I believe that's correct, your honor.

[Court]: And at the first trial, the district court excluded references to his membership in a gang. Right?

[Counsel for the State]: I believe that is correct, your honor, yes.

[Court]: And that was done at a pre-trial hearing with a motion. And that part of the transcript was not furnished for the second trial. Right?

[Counsel for the State]: I believe that's correct, your honor.

[Court]: And, as a result, the lawyer was not aware of the issue, and didn't object. And the evidence was admitted. Right?

[Counsel for the State]: Yes, your honor.

[Court]: And we have a number of cases that establish how prejudicial the introduction of gang testimony is. Right?

[Counsel for the State]: Yes, your honor, depending on the nature and the circumstances of gang testimony that is introduced.

[Court]: Well, in this case, it was introduced gratuitously, by the deputy district attorney asking for an elaboration on what "cuz" meant. Right?

[Counsel for the State]: Yes, your honor, but I believe it was limited to the definition of what "cuz" meant, or could have meant.

[Court]: Well, what was it relevant to?

[Counsel for the State]: Umm. . . I–I believe it was, it may have been relevant to the area and the, the drug deal, the drug transaction.

[Court]: The fact that he was part of a gang. Right?

[Counsel for the State]: That's right.

[Court]: There's a minute order which was entered in the first case that said there will be no mention of gangs or gang affiliation unless clearly–unless cleared by the court out of the presence of the jury. That one came after the hearing on which it was made clear of the prejudicial nature of gang testimony. Did the same district attorney, deputy D.A. Clabby, try the second trial?

[Counsel for the State]: I am not sure.

[Court]: Well if the first judge thought it was prejudicial, why shouldn't we just assume, therefore, that prejudice is established in the second trial. Counsel (a) didn't know about the issue, didn't know about the prior ruling, and presumably the state did. And yet in the face of that prior minute order, the state went ahead and let its witness–in fact, invited its witness–to go ahead and inject the issue of gangs. Why isn't that sufficient to establish error? . . .

By the time the State's argument time had expired, Kennedy's counsel had been so embarrassed by the court's relentless interrogation of counsel for the State–and by its viscerally derisive display of frustration at the close of his opening argument– that he began his rebuttal with an offer of atonement:

[Counsel for Kennedy]: I apologize to the court for missing that clear argument about the gang testimony.

Now, I have nothing but the greatest respect for my panel colleagues' lawyerly acumen. But I do not find its exercise compatible with the basic obligations of the office we share. As judges, the essence of our role is restrained service as impartial

arbiters of disputes framed by litigants. It is not, I respectfully suggest, to act as backup counsel when litigants make poor arguments, or when they come into court without first having "figured out" their cases[6]–even when doing so is motivated by a well-intentioned, but unavoidably standard-less "philosophy of law . . . infused by concepts like . . . social justice."[7]

Indeed, it was just a few months ago that today's majority offered almost precisely that admonition. In proceedings arising out of a case we resolved following an oral argument held *the very same morning we heard this appeal*, an order signed by Judges Reinhardt and Fisher instructed: "Given the overwhelming volume of work which today confronts our courts, we do not generally favor requiring judges . . . to search out and

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6. The majority's novel assertion that the habeas petitioner himself need neither argue nor identify prejudice because we must gauge the existence of prejudice in light of the record as a whole merely begs the question. Opinion at 7868 n.15. For who could deny that *when* we assess prejudice we must do so based on the complete record, as opposed to a fragmentary image of proceedings below? The real question, which the majority fails to answer, is what triggers such an assessment *in the first instance*. I submit that–as with any other claim courts are called upon to address–we only assess prejudice once the petitioner argues that he has been harmed in some specific way by an alleged constitutional error. The majority simply confuses a statement of how we must analyze well-preserved claims of prejudice with the untenable conclusion that such arguments can never be waived.

7. Stephen Reinhardt and Howard Bashman, 20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, *available at* http://legalaffairs.org/howappealing/20q/2004_02_01_20q-appellateblog_archive.html (quotation marks omitted); *see also* Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, Keynote Speech at the University of St. Thomas Law Journal Symposium Honoring Judge John T. Noonan, Jr. (Oct. 18, 2003) ("Social justice is a substantive legal principle that pervades all aspects of the law from torts to Social Security claims. The purpose of our legal system is not to provide an abstract code of rigid rules; rather it is to promote values that are compatible with the vision of a just existence for all individuals.").

research arguments that the other side does not make . . . ." *Gwaduri v. INS*, 362 F.3d 1144, 1146 (9th Cir. 2004). But what's sauce for the goose is supposed to be sauce for the gander. "Right?"

B

Kennedy's personal failure to present any cogent basis for thinking he was prejudiced by the state trial court's alleged *Britt* error aside, the thin reed relied upon by the majority hardly suffices to demonstrate that the Court of Appeal's finding of harmlessness was objectively unreasonable. In its decision on direct appeal, the Court of Appeal noted that beyond Detective McDowell's statement that "a lot of people use ['cuz']," the *prosecution* elicited an acknowledgment from McDowell that the term often is used simply to refer to people from one's own neighborhood. *See Kennedy v. Terhune*, No. D027718 at 7. It is perhaps for that reason that the defense *never objected* to McDowell's testimony regarding gang affiliation: Considered in context, McDowell's "allusion to gang membership was not significant." *Id.* & *id.* at 17. Indeed, it was laughable--as the Court of Appeal quite reasonably concluded.

Defense counsel's failure to object to the testimony has an additional significance: It undermines the chain of causation the majority uses to connect the trial court's failure to provide Kennedy a complete transcript to some meaningful error on retrial. The court speculates that, on notice of the need to object to McDowell's potentially prejudicial testimony concerning Kennedy's possible gang affiliation, there is "little doubt that Kennedy's counsel in the second trial would have presented a similar motion with a substantial likelihood of success." Opinion at 7869. Indeed, the majority tells us that counsel "would undoubtedly have based a motion to exclude on the arguments already presented." *Id.* at 7869 n.16. Yet, confronted in court with McDowell's etymological testimony, counsel did

not even seek to exclude it from the record as irrelevant or prejudicial. The majority's confidence that counsel would have acted differently prior to trial thus defies sound reason.

At the same time it undermines the majority's speculative chain of causation, counsel's failure to object to McDowell's testimony breaks it. For, in a variety of contexts, we have repeatedly recognized that contemporaneous objections can prevent reversible error stemming from the improper admission of prejudicial remarks by providing an opportunity for the court to purge the record or offer a curative instruction. *See, e.g.*, *Davis v. Woodford*, 333 F.3d 982, 997 (9th Cir. 2003) (prosecutorial misconduct/documentary vouching); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001) ("Doubtless, contemporaneous objections at trial are to be encouraged. Where objections are made, there may be an opportunity for the trial judge to foreclose further error or to provide a curative instruction.") (civil litigation/appeal to racial prejudice); *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (improper admission of pre-trial law enforcement officer statements); *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988) ("Although the prosecutor's behavior at trial might have approached misconduct, any error could have been cured by contemporaneous objections.") (prosecutorial misconduct/ argumentative vouching); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993) (prosecutorial misconduct/commenting on defendant's refusal to testify); *U.S. v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (prosecutorial misconduct/ referencing a non-testifying defendant's out-of-court behavior); *U.S. v. Stephens*, 486 F.2d 915, 918 (judicial misconduct/ instructing jury on how to weigh evidence); *see also supra* at 6, n.3. Thus, whatever impact McDowell's gang testimony may have had on Kennedy's trial–and again it was not unreasonable to conclude that it had none–it cannot be attributed to the trial court's refusal to deliver Kennedy a complete transcript of his initial trial.

Finally, I observe that there were ample additional reasons to believe that McDowell's allegedly prejudicial statements did not impact the jury's determination that Kennedy had committed the offense charged. In addition to the detective's persuasive testimony concerning the circumstances of petitioner's sale of a non-controlled substance in lieu of a con-trolled substance, Kennedy's "cousin," Randall Tucker, testified to delivering McDowell the paper bag containing the non-controlled substance (though he denied his own intent and any misrepresentation of its contents). As a result of that denial, the prosecution then lawfully impeached Tucker with evidence that he had pled guilty to the very offense at issue in Kennedy's trial. Given such powerful trial testimony to the jury suggesting petitioner's guilt, it seems something of a stretch to think that the jury's verdict would have been different had McDowell not been allowed to intimate that, among other completely innocuous meanings, the lingo "cuz" had gang significance.[8]

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8. Though superficially plausible, we have previously declined to adopt the majority's theory that lengthy deliberations necessarily support a finding of prejudicial error. *See* Opinion at 7871 & n.18. Indeed, in *United States v. Galindo*, 913 F.2d 777, 779 (9th Cir. 1990), we drew precisely the opposite inference. There, we addressed two criminal defendants' claims that they were incurably prejudiced by the judge's reference to ongoing plea negotiations. Rejecting the assertion, "we noted that the jury deliberated approximately three full days after a trial that lasted about that same length of time. Although this is a circumstance which in a given case can indicate a confused jury, here it negates any suggestion that the jury was stampeded to a verdict against the [defendants] out of prejudice resulting from the district court's statement at trial about plea negotiations." *Id.* at 779.

I do not mean to suggest that *Galindo* rules out the majority's argument. Indeed, we have reached such a conclusion in other cases. *See, e.g., Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir. 2003) (per curiam); *Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002). But the majority's opinion in this case hinges on the introduction of prejudicial testimony-- precisely the kind of occurrence that, like a judge's indication to the jury that a defendant is considering pleading guilty, could lead a jury to "stampede to a verdict." As in *Galindo*, that did not happen here. And the fact that we have refused to draw the majority's inference on direct appeal

III

Apparently in search of a result, the majority yet again runs roughshod over the principles of comity and federalism underlying the Antiterrorism and Effective Death Penalty Act. "Premised on the fact that the state courts, as part of a coequal judiciary, are competent interpreters of federal law deserving of our full respect," *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003), AEDPA mandates a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and adamantly "demands that state court decisions be given the benefit of the doubt." *Brodit v. Cambra*, 350 F.3d 985, 987 (9th Cir. 2003) (quotation and citation omitted). Notwithstanding the eminent reasonableness of their colleagues' analysis, two judges today inform seven others–a state trial judge, three state appellate judges, a federal magistrate judge, a federal district court judge, and a federal appellate judge (and that's not to mention the seven Justices of the California Supreme Court who summarily denied Kennedy's state petition for review)–that their understanding of the law is contrary to clearly established Supreme Court precedent. Again, one is tempted to ask: "Objectively, who is being unreasonable?" *Payton v. Woodford*, 346 F.3d 1204, 1225 (9th Cir. 2003) (en banc) (Tallman, J., joined by Kozinski, Trott, Fernandez, and T.G. Nelson, JJ., dissenting), *cert. granted sub nom. Goughnour v. Payton*, 541 U.S. ___, ___ S. Ct. ___, 2004 WL 102831 (May 24, 2004).

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in closely analogous circumstances in turn supports the reasonableness of the state court's decision not to draw the inference below. For if a "difference of opinion among the courts of appeal [means] we cannot say that the state court unreasonably applied clearly established Federal law," *Bailey v. Newland*, 263 F.3d 1022, 1032 (9th Cir. 2001), then a difference of opinion *within this* court of appeals would seem to suggest that we may not conclude that the state court's harmlessness determination was objectively unreasonable.

Our apparent inability to internalize AEDPA's strict standard of review has become a source of repeated public embarrassment. During the past two terms alone, we have been summarily reversed by a unanimous Supreme Court no fewer than *four times* for disregarding AEDPA's strict limitations on the scope of our collateral review of state court constitutional adjudications. *Middleton v. McNeil*, 541 U.S. ___, 124 S. Ct. 1830 (2004) (per curiam), *rev'g* 344 F.3d 988 (9th Cir. 2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 2002). Because we are once again "nowhere close to the mark," *Yarborough v. Alvarado*, 541 U.S. ___, 124 S. Ct. 2140, 2004 WL 1190042 (June 1, 2004), *rev'g Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), I lamentably, yet respectfully, dissent.

APPENDIX D

[Filed January 18, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT E. KENNEDY, Plaintiff, v. **CAL A. TERHUNE,** Defendant.	Case No. 99CV2505-BTM (CGA) **ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING PETITION, DISMISSING ONE CLAIM AND ISSUING CERTIFICATE OF APPEALABILITY IN PART**

Petitioner, Robert E. Kennedy, has filed a Petition for a Writ of Habeas Corpus ("Petition") challenging his conviction for selling a substance in lieu of a controlled substance and his 25 years to life three strikes sentence. The Magistrate Judge issued a Report and Recommendation that the Petition be denied. The Petitioner filed objections to the Report and Recommendation. The Court holds that the Report and Recommendation properly applied the correct law to the facts. The Court agrees with the Magistrate Judge's analysis and ADOPTS the Report and Recommendation.

Petitioner's request to dismiss that portion of his ineffective assistance of counsel claim relating to failure to object to the gang affiliation evidence is GRANTED. That claim is dismissed without prejudice.

The Petition for Writ of Habeas Corpus is DENIED.

The Court Issues a Certificate of Appealability on the following claims only: (1) whether denial of a transcript of pretrial proceedings and motions in limine was a denial of Petitioner's rights and whether it was harmless error; (2) whether defense counsel was ineffective in failing to seek to have the trial judge reduce the conviction to a misdemeanor; and (3) whether the California three strikes law (Penal Code § 667) provides fair notice that offenses committed prior to its enactment may qualify as strikes. A Certificate of Appealability of DENIED as to all other grounds.

The clerk shall enter judgment dismissing without prejudice the claim of ineffective assistance of counsel for failure to object to gang affiliation evidence and denying the Petition as to all other claims.

IT IS SO ORDERED.

Dated: January 17, 2001

HON. BARRY TED MOSKOWITZ
United States District Judge

[Filed January 19, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE Case Number 3:-99-cv-02505

Kennedy - PLAINTIFF

v.

Terhune - DEFENDANT

___ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the court adopts the report and recommendation [27-1] and denying the petitioner's petition for Writ of Habeas Corpus; the court grants the petitioner's request to dismiss that portion of his ineffective assistance of counsel claim relating to failure to object to the gang affiliation evidence and issues a certificate of appealability in part

1/19/01
Date

Roberta Westdal
Clerk

APPENDIX E

[Filed June 23, 2000]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT E. KENNEDY, Petitioner, v. **CAL A. TERHUNE,** Respondent.	Case No. 99-CV-2505-BTM (CGA) **REPORT AND RECOMMENDATION**

I

INTRODUCTION

Petitioner Robert E. Kennedy, a California state prisoner proceeding *pro se* and *in forma pauper*, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for selling a substance in lieu of a controlled substance (Cal. Health and Saf. Code § 11355) (SCD116399). Petitioner raises eight grounds for relief: (1) that the trial court violated Petitioner's right to equal protection by refusing to provide him a copy of the transcript of his first trial; (2) that the trial court violated Petitioner's right to represent himself at his second trial by refusing to provide a copy of the transcript of his first trial; (3) that the trial court misinstructed the jury on the elements of the charged offense; (4) that the trial court violated Petitioner's Sixth and Fourteenth Amendment rights by failing

to exclude certain prejudicial witness testimony; (5) that the prosecutor committed misconduct by eliciting certain prejudicial testimony from certain witnesses; (6) that trial counsel provided ineffective assistance by failing to pursue a reduced sentence; (7) that California's three-strikes law violates the Eight Amendment's prohibition of cruel and unusual punishment; and (8) that California's three-strikes law is unconstitutionally vague and violates the Ex Post Facto Clause of the U.S. Constitution.

II

STATEMENT OF FACTS[1]

On the afternoon of October 17, 1995, Police Detective Leroy McDowell was working an undercover narcotics operation in an area known for rock cocaine sales. McDowell saw Petitioner and another individual, Randall Tucker, across the street. McDowell made eye contact with Petitioner and nodded his head to indicate that he was asking if Petitioner was selling a controlled substance. Petitioner gestured for McDowell to cross the street.

McDowell approached the two men and asked, "Are you serving?", meaning in street terminology "are you selling a controlled substance?" Tucker responded, "What?" McDowell asked the question again, and Tucker responded, "What do you want?" McDowell said that he wanted "2-0," which in street terminology means $20 of rock cocaine or another controlled substance. Tucker asked, "2-0 of what?" and McDowell repeated, "[a] 2-0."

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1. The facts are taken from the opinion of the California Court of Appeal, Fourth Appellate District, filed September 8, 1998.

Petitioner asked for money, and McDowell took a prerecorded $20 bill from his pocket and gave it to Petitioner. Petitioner put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to a nearby fence, picked up a piece of a paper bag, and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance.

McDowell told Tucker that it was not enough and asked him to give some of the money back. Petitioner told McDowell to come back later. Tucker asked if McDowell was a police officer, and McDowell walked away.

Police arrested Petitioner and Tucker. In Petitioner's pocket, by found a $20 bill with numbers which previously had been recorded. The bag contained .08 grams of a noncontrolled substance.

Tucker testified that he and Petitioner had been in the area all day, and earlier had been contacted and patted down by police. Tucker further testified that later that day he saw McDowell standing across the street, and that McDowell said "2-0" several times. Tucker testified that he said, "No," and shook h is head, but that McDowell crossed the street and again asked for a 2-0.

Tucker testified that no drugs were mentioned, but that he noticed McDowell had money in his hand. McDowell handed the money to Tucker and because McDowell was "pushing too much," Tucker walked over to a dirt area, picked up a piece of a bag, and gave it to McDowell. Tucker testified that he did not know what McDowell wanted.

III

PROCEDURAL HISTORY

In an information filed by the District Attorney of San Diego County on November 5, 1995, Petitioner was charged with selling a substance in lieu of a controlled narcotic substance (Cal. Health and Saf. Code § 11355). The District Attorney further alleged that Petitioner had two no-probation prior convictions, two prison prior convictions, and two serious or violent felony convictions (Cal. Pen. Code §§ 1203, subd. (e)(4), 667.5, subd. (b), and 667, subds. (b) through (i), 1170.12), based upon his 1985 conviction for voluntary manslaughter. Clerk's Trnascript ("CT") 18-20.

Petitioner's jury trial began on February 27, 1996. On March 7, 1996, the jury deadlocked and the court declared a mistrial. II Clerk's Transcript ("II CT") 210-224. Petitioner's second trial began on October 25, 1996, and concluded with a verdict of guilty on October 31, 1996. In a bifurcated hearing conducted on November 1, 1996, the court found each prior conviction allegation to be true. II CT 248-49. The trial court struck Petitioner's two prior convictions, pursuant to Cal. Pen. Code § 667.5(b)[2/], and sentenced Petitioner to a state prison term of twenty-five years to life pursuant to Cal. Pen. Code §§ 667 (e)(2) and 1170.12(c)(2). CT 204; II CT 253.

The California Court of Appeal affirmed Petitioner's conviction on September 8, 1998, and the California Supreme Court denied Petitioner's petition for review on December 16, 1998.

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2. § 667.5(b) provides, *inter alia*, that "where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony . . . ."

Petitioner filed a present petition on November 26, 1999. On January 26, 2000, Responded filed an Answer which addressed the first four claims of Petitioner's present petition. Petitioner's filed a Traverse which pointed out that Respondent's Answer failed to address claims five through eight of the present petition. Responded requested, and the Court granted, leave to file a Supplemental Answer addressing the previously overlooked claims. On April 4, 2000, Respondent filed a Supplemental Answer, and on April 27, 2000 and May 5, 2000, respectively, Petitioner filed Supplemental Traverses.

IV

DISCUSSION

A. Legal Standard

Title 28, United States code, § 2254(a), sets forth the scope of review for a section 2254 petition for writ of habeas corpus:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in *violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a) (West 1994) (emphasis added). See *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Manhalt v. Reed*, 847 F.2d 576, 579 (9th Circ. 1988).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "worked substantial changes to the law of habeas corpus." *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir. 1997). Amended 28 U.S.C. § 2254(d) now reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not bwe granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp. 1999).

Section 2254(d)(1) now "explicitly identifies only the Supreme Court as the font of 'clearly established' rules." *Id.* This means "[a] state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law . . . ." *Moore*, 108 F.3d at 264. "[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." *Id.*; *see Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

The Ninth Circuit has not required, however, that "clearly established law" involve the "identifical factual situation" as the case at bar. *See Houston v. Roe*, 177 F.3d 901, 906 (9th Cir. 1999) (finding that for a petitioner to prevail on federal habeas "the Supreme Court need not have addressed a factually identical case, § 2254 (d) only requires that the Supreme Court clearly determine the law"); *Kramer*, 167 F.3d at 498.

Under the AEDPA this Court performs a two step inquiry. First, this Court must identify what, if any, "clearly established federal law" governs each issue presented in the petitioner. *Williams v. Taylor*, 120 S. Ct. 1495, 1505 (2000); *see also Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir. 1998) (stating that the court of appeals must review de novo "the determination of what is 'clearly established Federal law, as determined by the [United States] Supreme Court'") (quotation omitted). Second, fi clearly established federal law exists, this Court must decide whether the California Supreme Court's decision was contrary to, or constituted an unreasonable application of, that clearly established law. *Williams*, 120 S. Ct. at 1505. Ninth Circuit caselaw provides "persuasive authority" for purposes of determining what law is "clearly established" or whether the state court decision is an "unreasonable application" of Supreme Court law. *see Duhaime v. Ducharme*, 200 F.3d 597 (9th Cir. 2000).

In *Williams v. Taylor*, the Supreme Court defined the terms "contrary to" and "unreasonable application" as used in § 2254(d). Specifically, the court stated:

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S. Ct. at 1523 In *Van Tran v. Lindsey*, 2000 WL 622070 (9th Cir. May 16, 2000), the Ninth Circuit shed further light on the meaning of "unreasonable application" of clearly

established federal law by looking to the doctrine of "clear error." The court held that:

> [U]nder AEDPA we must reverse a state court's decision as involving an 'unreasonable application' of clearly established federal law when our independent review of the legal questions does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rate leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous – in other words that clear error occurred.

Id. at *7.

AEDPA also requires deference to state court findings of fact. Under § 2254(e)(1), federal courts must "give great deference to the state court's factual findings." *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Circ. 1997) (en banc). As amended § 2254(e)(1) provides: "[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.A. § 2254(e)(1) (West Supp. 1999). The petitioner has "the burden or rebutting the presumption of correctness by clear and convincing evidence." *Id.*

B. Petitioner's Contentions

1. Failure of Trial Court to Provide Petitioner With a Transcript of His First Trial

As mentioned above, Petitioner's first trial resulted in a mistrial after the jury was unable to reach a verdict. II CT 222. After the court declared a mistrial, defense counsel Roseline Feral requested that the court order a complete transcript of the first trial for the purpose of preparing for the subsequent retrial. Reporter's Augmented Trial Transcript on Appeal ("RAT") 177.

The court suggested that counsel and the prosecutor attempt to resolve the case before ordering that a transcript be prepared. The court also noted that Petitioner was entitled to a transcript of only trial testimony. RAT 177. Apparently believing that she would be representing Petitioner on retrial, defense counsel did not object to the court ordering only the trial testimony transcript. Reporter's Transcript dated September 16, 1996, p. 5-6. The court subsequently ordered a transcript of only the trial testimony. II CT 227.

On September 16, 1996, the trial court granted Petitioenr's request to proceed in *pro per* and appointed advisory counsel to assist him at trial. Reporter's Transcript dated September 16, 1996, p. 7-8. Ten days later, Petitioner requested a complete copy of his firs trial transcript arguing that he needed a fult transcript of all motion hearings, opening statements, and closing argument in order to adequately prepare for his self-representation on retrial. Transcript of September 26 and October 26, 1996 Motion Hearings ("MT") 4-6. The court denied Petitioner's request. MT 6.

a. Equal Protection

Petitioner contends that the trial court violated his right to equal protection when it refused to provide him with a complete trial transcript of his first trial. Petitioner maintains that without the benefit of the entire trial transcript, including all motions, opening statements and final argument, he was not able to fully prepare for his retrial.[3/]

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3. Respondent first contends that this claim fails to present a federal question, but rather, merely alleges a violation of state law. In support of this contention, Respondent notes that the California Court of Appeal evaluated Petitioner's claim based upon California state law. Respondent maintains that "Petitioner has not asserted his claim in any federal context which entitles him to relief" and that "Petitioner's citation to general federal principles does not suffice to pose a federal question for the

The Supreme Court has stated that "the state must, as a matter or equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Griffin v. Illinois*, 351 U.S. 12 (1956). Although the exact contours of that principle have not been defined, in *Britt v. North Carolina*, 404 U.S. 226 (1971), the Supreme Court held that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt*, 404 U.S. at 227. The Court identified two factors which are relevant to the determination of such need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability or alternative devices which would fulfill the same functions of the transcript. *See Id.* In discussing the first factor, the Supreme Court noted that the value of a transcript of a mistrial can ordinarily be assumed based upon its value as a discovery device in preparation for a retrial and as a tool during trial for impeachment of prosecution witnesses. *See Id.* at 228.

There is no dispute that Petitioner was entitled to at least some portion of the transcript of his first trial. Indeed, the trial court recognized Petitioner's constitutional right to a transcript and provided him with a transcript of all testimony from his first trial. The issue is whether clearly established Supreme Court law requires that the State have provided Petitioner with a

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state court to resolve." Answer, p. 9.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 501 U.S. 62, 68(1991). Habeas relief is not available for an alleged error *in* the interpretation or application of state law. *See Id.* at 67-68. In both the present petition and in state court, Petitioner maintains that the first trial violated the Equal Protection Clause of the U.S. Constitution. Accordingly, the Court finds that Petitioner has presented a federal question.

complete trial transcript, including all motion hearings, opening statements, and closing arguments.

As noted by the state appellate court, the trial court provided Petitioner with a complete transcript of the trial testimony. Thus, the state appellate court concluded that Petitioner had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. *See People v. Kennedy*, No. D027718, unpublished slip op. at 6.

This Court finds that the state appellate court's reasoning was not an unreasonable application or, nor contrary to, clearly established Supreme Court law as set forth in *Britt*. *See e.g., Mayer v. City of Chicago*, 404 U.S. 189 (1979) (explaining, in the context of a request for a trial transcript for the purpose of an appeal, that the trial court need provide only a record of sufficient completeness to permit proper consideration of one's claims rather than a complete verbatim transcript); *Williams v. Leeke*, 444 S. Supp. 229, 232 (D.S.C. 1976) (holding that *Britt* does not require that a trial court provide an indigent criminal defendant with a transcript of arguments to the jury, i.e. opening statements and closing arguments).[4/]

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4. The court notes that Petitioner did not explain to the trial court, nor in his present petition, why he needed the additional portions of the trial transcript in order to prepare for his defense at his retrial. Although the Supreme Court has stated than indigent criminal defendant need not demonstrate particularized need in order to be entitled to a transcript of prior proceedings, *see Britt*, 404 U.S. at 225, Petitioner has failed to articular any reason other than that he generally needed the materials to prepare for retrial. To the extent that *Britt* held that the courts may ordinarily assume an indent criminal defendant's need for a transcript of a mistrial in order to prepare for retrial, as discussed above, this Court finds that the trial court satisfied any such need by providing Petitioner with a complete transcript of the trial testimony. *See Britt*, 404 U.S. at 228.

Moreover, Petitioner has not alleged that the denial of his request for a transcript of opening statements, closing arguments, and motion hearings prejudiced him in any way. Thus, even assuming that the trial court erred in failing to provide petitioner with the entire transcript of the first trial, the Court finds such error harmless beyond a reasonable doubt. *See United States v. Rosales-Lopez*, 617 F.2d 1349, 1356 (9th Cir. 1980) (finding the application of an erroneous legal standard to a *Britt* claim harmless beyond a reasonable doubt because Petitioner did not demonstrate prejudice resulting from the trial court's refusal to provide a transcript of a suppression hearing); *accord United States ex rel. Moore v. People of the State of Illinois*, 577 F.2d 411 (7th Cir. 1978) (finding that error in the failure to provide a transcript of a preliminary hearing was harmless beyond a reasonable doubt); *United States ex rel. Cadogan v. LaVallee*, 428 F.2d 165 (2d Cir. 1970) (same). Petitioner has not demonstrated that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

b. Right to Self Representation

Petitioner also contends that the trial court's refusal to provide him with a copy of the complete transcript of his first trial caused him to forfeit his right to represent himself under *Faretta v. California*, 422 U.S. 806, 835 (1975), and consequently forced him to accept representation by appointed counsel at the retrial.

As discussed above, Petitioner initially exercised his right under *Faretta* and requested that the trial court permit him to represent himself during his retrial. However, for reasons that are not clear from the record, Petitioner subsequently requested that the trial court appoint counsel to represent him. Although Petitioner now claims that his decision to relinquish his right to self representation was motivated by the trial court's refusal to

provide him with additional portions of the trial transcript, the record does not support Petitioner's contention. As noted by the state appellate court, Petitioner provided no reason to the trial court when he requested appointment of counsel, and the record does not otherwise reveal Petitioner's motive for doing so.

Accordingly, Petitioner has not demonstrated that his decision to give up his right to self representation was involuntary. Nor has Petitioner demonstrated that any of the trial court actions influenced his decision to request appointment of counsel. Petitioner has failed to demonstrate that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

2. Jury Instruction

Petitioner contends that the trial court erred in instructing the jury that the crime of sale of a substance in lieu of a controlled substance is a general intent crime.

At the conclusion of Petitioner's retrial, the prosecutor, defense counsel, and the court discussed which jury instructions would be given. Defense counsel lodged an objection to CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). In response, the prosecutor stated that they would not need the instruction because the crime was one of general intent. Defense counsel acknowledged, "That's true," and the court clarified that neither attorney wanted the instruction. II RT 138-139. Later, without comment from either side, the court told counsel that it would give CALJIC No. 3.30 (Concurrence of Act and General Criminal Intent).

As discussed above, this Court's review is limited to determining whether the trial court's decision was contrary to, or involved an unreasonable application of, clearly established

federal law as determined by the United States Supreme Court. The Supreme Court's clearly established law with respect to claims of jury instruction error is set forth in *Estelle v. McGuire*, 502 U.S. 62 (1991). In *Estelle*, the Court held that a federal court may not grant habeas relief merely because an instruction was allegedly incorrect under state law. Rather, error in instructing the jury warrants habeas relief only when "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 71(quoting *Cupp v. Naughten*, 414 U.S. 141 (1973)).

The state appellate court, relying on state law, found that the trial court had appropriately instructed the jury that selling a substance in lieu of a controlled narcotic substance in violation of Cal. Health & Saf. Code § 11355 is a general intent rather than specific intent crime. *See People v. Lechlinski*, 60 Cal. 3d 766, 768-69 (1976) (holding that *selling* of a substance in lieu of a controlled substance is a general intent crime, whereas *offering* a substance in lieu of a controlled substance is a specific intent crime). Petitioner has not demonstrated that the jury instruction was incorrect under state law. Although Petitioner asserts that the trial court's "failure to instruct the jury that it must find specific intent in order to find guilt violates the federal constitution," Petitioner cites no authority to support this claim. Petitioner has not demonstrated that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

3. Evidence That Petitioner's Alleged Accomplice Was Convicted of the Offense For Which Petitioner Was On Trial

Petitioner contends that the trial court violated his Sixth and Fourteenth Amendment rights "by allowing the prosecutor to mislead and manipulate the jury with false information that was

highly prejudicial of witness' [sic] alleged conviction of the same offense. Petition at 9.

During the defense case, Petitioner's alleged accomplice, Randall Tucker, testified contrary to the testimony of Dettective McDowell. II RT 112-118. Tucker denied that Petitioner had said, "give it to him, cuz," when the detective gave him money, denied that McDowell asked whether Petitioner and Tucker were serving, and stated that he had given the piece of bag to the detective to get rid of him. II RT 115-116.

At the close of the prosecutor's cross examination of Tucker, the prosecutor inquired about Tucker's prior convictions, to which he admitted. II RT 133 -34. The prosecutor then requested a sidebar conference and notified the court and defense counsel that she wanted to ask Tucker about his having been convicted of the current offense. II RT 134. Defense counsel objected, noting that such questioning would delay the trial and would be irrelevant. The court clarified that the prosecutor would not be asking about the plea itself, but rather the fact of the conviction. Defense counsel then objected on the ground of California Evidence Code section 352.[5/] The court noted the objection but allowed the question. The prosecutor asked the witness if he had been "convicted of this offense," and Tucker answered affirmatively. II RT 134-35.

Petitioner maintains that Tucker's testimony was misleading because it implied that a jury had found Tucker guilty of the same offense based on the same facts, whereas Tucker had in fact pled guilty to the offense, in exchange for a

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5. Cal. Evid. Code § 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

reduced sentence. Petitioner contends that the trial court's failure to engage in appropriate balancing of the probative value of the testimony against its prejudicial effect deprived Petitioner of his right to a jury trial and the presumption of innocense.

The Supreme Court has stated that a federal court conducting habeas review is "limited in deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 68. The Court has further stated that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.*

To the extent that Petitioner contends that the trial court did not properly balance the probative value of the admitted evidence in relation to its potentially prejudicial effect, Petitioner has not stated a federal claim. *See Id.*; 28 U.S.C. § 2254 (a). To the extent that Petitioner contends that the allegedly erroneous admission of evidence deprived him of his right to a jury trial and presumption of innocence, the Court finds that Petitioner's contention lacks merit.

There is no established Supreme Court law governing the introduction of a co-defendant's guilty plea or conviction of the crime for which a defendant is on trial. However, the Ninth Circuit and several other circuits have held that although a co-defendant's guilty plea or conviction may not be used as substantive evidence of the guilt of those on trial, it may properly be considered by the jury in evaluating witness credibility. *See Baker v. United States*, 393 393 F.2d 604, 614 (9th Cir.), *cert. denied*, 393 U.S. 835 (1968); *see also United States v. Whitehead*, 618 F.2d 523, 529 (4th Cir. 1980); *United States v. Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam). Thus, admissibility of a plea turns on the purpose for which it is offered.

Here, noting that the prosecutor's questioning was limited to one question pertaining to the fact of Tucker's conviction, the California Court of Appeal found that evidence of guilty plea was permissible to impeach his testimony that he had committed no crime related to the transaction for which Petitioner was on trial. This Court agrees that the questioning did no more than elicit the fact that Tucker pled guilty, and that the evidence was relevant as bearing on Tucker's credibility. *See United States v. Halbert*, 640 F.2d 1000, 1005-06 (9th Cir. 1981) (per curiam). Accordingly, this Court finds that the California Court of Appeal's decision was not contrary to, nor an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S.Ct. at 1523. Petitioner is therefore not entitled to habeas relief on this claim.

4. Prosecutorial Misconduct

Petitioner contends that he was deprived of his rights under the Sixth and Fourteenth Amendments and his right to due process because the trial court allowed the prosecutor to improperly elicit evidence of Petitioner's gang affiliation and in-custody status. Attachment to Petition, p. 1.

As with improper jury instructions, alleged prosecutorial misconduct warrants federal habeas relief only where it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnely v. DeChristoforo*, 416 U.S. 637, 643 (1974) (internal quotations omitted).

Petitioner maintains that the prosecutor improperly elicited testimony regarding Petitioner's gang affiliation when she asked Detective McDowell to explain the meaning of the Petitioner's words when Petitioner stated: "Give it to him cuz." II RT 40. Detective McDowell explained that the word "cuz" was terminology used by Crip gang members, people who want to

be gang members, or people from one's neighborhood. Petitioner contends that this testimony alerted the jury to the fact that Petitioner was a member of a gang.

Petitioner also contends that the prosecutor improperly elicited information regarding Petitioner's in-custody status when he asked McDowell to identify Petitioner in court, and McDowell responded by identifying Petitioner as "[t]he person at the defense table with a band on his wrist and goldish brown shirt and hair straight back and goatee." I RT 36. Petitioner contends that this testimony alerted the jury to the fact that Petitioner was incarcerated.

The state appellate court rejected Petitioner's claims because he failed to show how he was prejudiced by the alleged references to his gang affiliation and in-custody status. Moreover, the state court found that Petitioner had waived the"gang affiliation" issue by not objecting to the questions when they were asked. *See People v. Kennedy*, No. D022718, unpublished slip op. at 17.

Although the state appellate court did not directly address the issue of whether or not prosecutorial misconduct had occurred, this Court finds that Petitioner has not made a threshold showing of misconduct. Petitioner maintains that Detective McDowell's testimony identified him as a member of a gang, and thereby deprived him of due process. However, a review of the record reveals that McDowell's testimony merely suggested that use by gang members was one of several possible uses of the term"cuz." McDowell's testimony did not identify Petitioner as a member of a gang. Similarly, this Court finds that McDowell's reference to Petitioner's wrist band was open to interpretation by the jury and did not affirmatively identify Petitioner's in-custody status. Thus, Petitioner has not demonstrated that the prosecutor's actions "so infected the trial

with unfairness as to make the resulting conviction a denial of due process." *See Darden*, 477 U.S. at 181.

Even assuming that the prosecutor's questions constituted misconduct, the Court agrees with the state appellate court's finding that Petitioner has not demonstrated how he was prejudiced by the alleged incidents of prosecutorial misconduct. *See Thompson v. Borg*, 74 F.3d 1571, 1577 (9th Cir. 1996) (explaining that allegations of prosecutorial misconduct are subject to harmless error review). Accordingly, Petitioner has not demonstrated that the state appellate court's conclusion was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523. Petitioner therefore is not entitled to habeas relief on this claim.

5. Ineffective Assistance of Counsel

Petitioner contends that he was denied his Sixth Amendment right to competent representation because his trial counsel failed to "investigate and . . . argue a meritorious sentence alternative." Attachment to Petition, p. 2.[6] Petitioner

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6. Petitioner also appears to contend that trial counsel was ineffective because he failed to adequately review the proceedings in the first trial, and that if he had done so, he would have objected to the admission of gang affiliation evidence. Attachment to Petition, p. 2. Respondent maintains that Petitioner has not exhausted this portion of his ineffective assistance of counsel claim in state court. Respondent argues that the entire petition must therefore be dismissed, because it contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509 (1982) (holding that failure to exhaust state remedies as to every claim in petition mandates dismissal of entire petition without reaching the merits of any of the claims). In his first supplemental traverse dated April 24, 2000, Petitioner concedes that he has not exhausted this particular claim, and he requests that the Court dismiss the claim from the present petition. Accordingly, the Court recommends dismissal of this portion of Petitioner's ineffective assistance of counsel claim.

maintains that he could have avoided a prison sentence of twenty-five years to life had his counsel requested that the court during sentencing treat his current offense as a misdemeanor rather than a felony.

The Sixth Amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI. The Supreme Court has recognized that the right to counsel necessarily embodies "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance at trial was deficient, and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong requires a showing that functioning as the "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The prejudice prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

The state appellate court rejected Petitioner's claim because it could find no basis for concluding that the trial court was not aware of its authority to reduce Petitioner's current offense to a misdemeanor under the three-strikes law. Under California law, trial courts retain the power to reduce a "wobbler" offense (a felony which can statutorily be reduced to a misdemeanor) from a felony to a misdemeanor under the three-strikes law. *See People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 979 (1997); Cal. Penal Code section 17, subdivision (b).[7/] In deciding whether to reduce a "wobbler" offense from a felony

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7. No one contends that Petitioner's current offense was not eligible for reduction to a misdemeanor pursuant to section 17(b).

to a misdemeanor for purposes of sentencing under the three - strikes law, the trial court was bound to consider the nature and circumstances of Petitioner's current offense, his appreciation of or attitude toward the offense, his criminal past, and concerns for public safety. *See Alvarez*, 14 Cal. 4th at 979. These considerations were addressed in Petitioner's trial counsel's statement in mitigation submitted to the trial court in support of striking one or more of Petitioner's prior convictions, although counsel did not request that the conviction be reduced to a misdemeanor.

This Court agrees with the state appellate court's finding that because Petitioner has not presented any evidence that demonstrates that the trial court was not aware of its inherent authority to reduce Petitioner's current offense to a misdemeanor for purposes of sentencing under the three-strikes law, Petitioner has not demonstrated that his trial counsel's performance was deficient for failing to request that trial court do so. Moreover, Petitioner has pointed to nothing in the record to indicate that the trial court would have imposed a less severe sentence even if Petitioner's trial counsel had requested that the court treat the nature of his offense as a misdemeanor rather than a felony. *See Alvarez*, 14 Cal. 4th 976-78 (explaining that a trial court's decision to reduce a "wobbler" to a misdemeanor pursuant to section 17 (b) is purely discretionary).[8]

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8. Significantly, in deciding whether to strike Petitioner's prior felonies pursuant to § 667(e) (2), the Court considered many of the same factors that it would have considered in deciding whether to reduce Petitioner's current conviction to a misdemeanor under section 17(b). Petitioner has not demonstrated that the trial court, in deciding whether to reduce the nature of the current offense pursuant to § 667.5(b), had reason to vary from its decision not to strike Petitioner's prior convictions pursuant to § 667(e) (2). Moreover, during a recess at Petitioner's trial, there was some discussion between counsel and the trial judge regarding the fact that some of Petitioner's prior convictions had been reduced to misdemeanors pursuant to section 17(b). II RT 88-90. Thus, it appears that the trial court was aware of its authority to reduce the nature of Petitioner's current offense

This Court finds that Petitioner's counsel's failure to request that the trial court exercise its discretion by reducing Petitioner's offense from a felony to a misdemeanor for sentencing did not fall below the objective standard of reasonableness mandated by the Sixth Amendment. *See Strickland*, 466 U.S. at 687-88. Accordingly, Petitioner has not demonstrated that the decision of the California Court of Appeal was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523.

6. Unconstitutionality of Three-Strikes Law

a. Cruel and Unusual Punishment

Petitioner contends that his prison sentence of twenty-five years to life constitutes cruel and unusual punishment in violation of the Eight Amendment because he is being punished more severely than someone who has been convicted of a more serious felony.

In order for Petitioner's argument to prevail, he would have to establish that the current law recognizes a proportionality argument, and that his sentence is such that it is disproportional to the crime committed. "The leading Supreme Court case on the Eighth Amendment's prohibition against cruel and unusual punishment is *Harmelin v. Michigan*, 501 U.S. 957 (1991)." *Bocian v. Godinez*, 101 F.3d 465, 472 (7th Cir. 1996). However, because *Harmelin* was a plurality opinion, it does not provide the lower courts with a clear analytical framework for analyzing Eight Amendment challenges to sentencing under the three-strikes law. In *Harmelin*, two United States Supreme Court Justices opined that there is no proportionality guarantee in the Eighth Amendment (opinion by Justice Scalia, joined by Chief Justice Rehnquist). *See Id.* at 965 ("We conclude from

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pursuant to section 17(b).

this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Three Justices, in the concurrence by Justice Kennedy (joined by Justices O'Connor and Souter), concluded that a proportionality guarantee does exist, but only for those sentences that are "grossly disproportionate" to the crime. *See Id.* at 1001 (citing *Solem v. Helm, supra* at 288). Thus, if the plurality position of Justices Scalia and Rehnquist is in the future adopted by a clear majority of the court, Petitioner's argument would clearly fail. If, however, the plurality position of Justices Kennedy, O'Connor and Souter is in the future adopted by a clear majority of the court, then a disproportionality argument, such as the one Petitioner makes in instant petition, might have merit, depending on the circumstances of the case.

Assuming that the Eight Amendment does include a proportionality guarantee, in order "(to) determine whether a sentence 'grossly disproportionate,' we look to *Rummel v. Estelle*, 445 U.S. 263 (1980), as a benchmark." *United States v. Gonzales*, F.3d 928, 943 (5th Cir. 1997). The petitioner in *Rummel* committed three felonies between 1964 and 1973: (1) fraudulent use of a credit card for $80.00; (2) passing a forged check with a face value of $28.36; and (3) obtaining $120.75 under false pretenses. *Rummel* at 286. The court upheld a life sentence under the recidivist statute stating:

> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

Id. at 285.

Here, assuming that the Eighth Amendment contains a proportionality guarantee, Petitioner has not demonstrated that

his sentence amounts to cruel and unusual punishment. Although Petitioner's sentence of twenty-five years to life for selling .08 grams of a substance in lieu of a controlled narcotic substance might appear harsh if this were his only offense, Petitioner's status as a recidivist is what makes him eligible for a more severe sentence. Petitioner's sentence was based on his commission of the current felony after having been convicted of at least two prior "serious" or "violent" felonies. *See* Cal. Penal Code § 667(b) ["It is the intent of the Legislature in enacting subdivisions (b) to (I), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."]. Here, Petitioner's first serious or violent prior was a 1982 conviction for forcible rape with a deadly weapon; his second serious or violent prior was a 1985conviction for voluntary manslaughter. I CT 179-88; II CT 262.

Using *Rummel* as the benchmark, and comparing the sentences in *Harmelin* and *Rummel* to the present case, this Court finds Petitioner's sentence under California's Three Strikes Law is not gross disproportionate and therefore cruel and unusual. Accordingly, Petitioner has not "demonstrated that the state appellate court's conclusion was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523. Petitioner therefore not entitled to habeas relief on this claim.

b. Vagueness and Ex Post Facto

Petitioner contends that California's Three-Strikes law is "unconstitutionally vague violating both the state and federal constitutions due process [sic], because it does not state with sufficient clarity whether pre-enactment felony convictions maybe used as strikes to trigger application of the sentencing scheme." Attachment to Petition, p. 4.

The U.S. Supreme Court has stated that "[v]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Unless First Amendment freedoms are implicated – and that is not the case here – "a vagueness argument may not rest on hypothetical applications, but must show that the law is vague as applied to the facts of the case at hand .... The test for vagueness is whether the provision fails to give a person of ordinary intelligence fair notice that it would apply to the conduct contemplated." *United States v. Johnson*, 130 F.3d1352 (9th Cir. 1997) (citations omitted).

Petitioner maintains that the three-strikes law is unconstitutionally vague as applied to the facts of his case in that it did not provide him notice that his previous convictions, incurred prior to the enactment of the three-strikes law, could constitute strikes. Although Petitioner does not state with particularity what section of the three-strikes law he contends is unconstitutionally vague, it appears that he is referring to § 667(d)(1), which states, *inter alia:*

> The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) through (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon initial sentencing, converts the felony to a misdemeanor.

Cal. Penal Code § 667(d)(1) (West 2000) (emphasis added).

The state appellate court relied on *People v. Sipe*, 36 Cal. App. 4th 468 (1995) in finding that the three-strikes law survived Petitioner's vagueness challenge. The appellant in *Sipe* argued that the language "upon the date of that prior conviction" meant that only felony convictions incurred after the effective date of the three-strikes law could be considered "strikes". The

California Court of Appeal rejected the appellant's argument stating:

> In focusing solely on the requirement that the determination be made 'upon the date of that prior conviction," [the appellant] ignores the rest of the sentence. In construing a statute, the word must be read in context. The balance of the sentence provides the sentence imposed shall not affect the determination, unless 'the sentence automatically, upon initial sentencing, converts the felony to a misdemeanor.' The statute then sets forth various dispositions that will not affect the felony/misdemeanor determination. Read in context, the 'determination' at issue must be whether the prior conviction 'is a prior felony conviction' rather than a conviction, so subsequent events, such as a reduction to a misdemeanor will not affect its classification as a felony conviction.

Sipe, 36 Cal. App. 4th. at 478 (internal citations omitted).

The *Sipe* court concluded that the language of the statute clearly and unambiguously permits pre-enactment convictions to be used as "strikes". *See id.* This Court agrees with the reasoning in *Sipe* that when viewed in context, the language which Petitioner contends is vague clearly provides that pre-enactment felony convictions can constitute strikes under the three-strikes law. Thus, given the clarity of § 667(d) (1), this Court finds that a repeat offender of ordinary intelligence would have had fair notice that felony convictions incurred prior to the enactment of the three-strikes law could constitute strikes, incurring enhancement of a criminal defendant's sentence for the current offense. Accordingly, Petitioner has not demonstrated that the decision of was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523.

To the extent that Petitioner asserts an Ex Post Facto challenge to the three-strikes law, under clearly established Supreme Court law, the application of an enhancement due to a prior conviction is not a violation of the Ex Post Facto Clause. *See McDonald v. Massachusetts*, 180 U.S. 311, 312-313 (1901); *Fong v. United States*, 287 F.2d 525, 526 (9th Cir.) *cert. denied*, 366 U.S. 971 (1961); *see also United States v. Sorenson*, 914 F.2d 173, 174 (9th Cir. 1990) (dismissing ex post facto challenge to enhancement with prior convictions as meritless) *cert. denied*, 498 U.S. 1099 (1991). Enhancement of a sentence based on prior convictions is not a penalty for the prior offense. *See McDonald*, 180 U.S. at 312-313. Rather, the enhancement punishes the repetitive nature of the present offense. *See id.*

Thus, California's use of pre-enactment convictions as "strikes" under the Three Strikes law does not offend federal due process, nor does it violate the Ex Post Facto Clause. Accordingly, Petitioner has not demonstrated that the decision of the California Court of Appeal was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S.Ct. at 1523. Petitioner is therefore not entitled to habeas relief on this claim.

V

CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice and that judgment be entered accordingly.

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than July 17, 2000, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than July 31, 2000. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 22, 2000

/S/
CYNTHIA G. AARON
United States Magistrate Judge

APPENDIX F

[Filed September 8, 1998]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. **ROBERT EARL KENNEDY,** Defendant and Appellant.	D027718 (Super. Ct. No. SCD 116399)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth K. So, Judge. Affirmed.

Robert Earl Kennedy appeals a judgment convicting him of selling a substance in lieu of a controlled narcotic substance (Health & Saf. Code, § 11355). The court also found Kennedy had two no probation prior convictions (Pen. Code, [1] § 1203, subd. (e)(4)), two prison prior convictions (§ 667.5, subd. (b)), and two prior serious or violent felony convictions (§ 667, subds. (b)-(i)). The court sentenced him to a term of 25 years to life.

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1. All statutory references are to the Penal Code unless otherwise specified.

Kennedy contends the judgment must be reversed because the court denied his request for complete transcript of the proceedings of his first trial which had resulted in a mistrial. He claims this denial violated his equal protection rights and his right to self-representation. He also argues he was entitled to a judgment of acquittal at the close of the People's case-in-chief on the ground of insufficient evidence; the evidence was insufficient to show he agreed to sell a controlled substance and had knowledge a substitute was delivered; the court erred in instructing the jury only general intent is necessary for commission of the crime; his counsel was ineffective for failing to request an instruction on a lesser related offense; his conviction is precluded by provisions of Health and Safety Code section 109575, which deals with distribution of an imitation controlled substance; and the court improperly admitted evidence that his accomplice was convicted of the same crime, and that Kennedy was in custody and had been a gang member. He also asserts resentencing is required because his counsel did not request his current offense be reduced to a misdemeanor, his sentence is cruel and unusual, and the three strikes law is unconstitutionally vague.

We affirm.

I

On the afternoon of October 17, 1995, Police Detective LeRoy McDowell was working an undercover operation in an area known for rock cocaine sales. When McDowell saw Kennedy and Randall Tucker across the street, he made eye contact with Kennedy and nodded his head to indicate he was asking if Kennedy was selling a controlled substance. Kennedy gestured for McDowell to cross the street.

McDowell approached and asked, "Are you serving?", meaning in street terminology "are you selling a controlled

substance? Tucker responded, "What?" McDowell asked the question again. Tucker said, "What do you want?" McDowell said he wanted a "2-0," which generally means $20 of rock cocaine or another controlled substance. Tucker asked, "2-0 of what?" and McDowell repeated,"[A] 2-0."

Kennedy asked for money. McDowell took a prerecorded $20 bill from his pocket and gave it to him. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to a nearby fence, picked up a piece of paper bag and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance.

McDowell told Tucker it was not enough; to give him more or give part of his money back. Kennedy told McDowell to come back later. Tucker asked if he were a police officer. McDowell walked away.

Police arrested Kennedy and Tucker. In Kennedy's pocket they found a $20 bill with numbers which previously had been recorded. The bag contained .08 grams of a noncontrolled substance.

Defense Case

Tucker testified he and Kennedy had been in the area all day and earlier had been contacted and patted down by police.

Tucker testified he saw McDowell, who said "2-0" from across the street two or three times. Tucker testified he said,"No,"and shook his head, but McDowell crossed the street and twice asked for a 2-0.

Tucker said no drugs were mentioned, but he noticed McDowell had money in his hand. McDowell handed the money to Tucker. Tucker said McDowell was "pushing too

much" so he walked over to a dirt area and picked up a piece of paper bag, which he gave to McDowell. He said McDowell protested it was not a 2-0, but Tucker said it was all he had. Tucker said "2-0" and "are you serving" can mean different things and he did not know what McDowell wanted.

II

Kennedy contends automatic reversal is required because the court refused his request for a complete transcript of his first trial, in which the jury was unable to reach a verdict. At the close of that trial on March 7, 1996, Kennedy's defense attorney requested a transcript be prepared. When the court ordered preparation of the trial testimony only, Kennedy's attorney, "that's fine."

Kennedy later elected to represent himself and new counsel was appointed to advise him. On September 26, the court ascertained the trial testimony had been transcribed and apparently given to Kennedy and denied Kennedy's request for a more complete transcript, including motion hearings, opening statements, and closing arguments. A month later, just before the second trial, Kennedy relinquished his right to represent himself and the court appointed his advisor as trial counsel.

An indigent defendant is presumed to have need of a transcript of the proceedings of his earlier trial in order to present an effective defense. (*People v. Hosner* (1975) 15 Cal. 3d 60, 64.) It is the People's burden to show under the particular circumstances of the case the defendant is able to present an effective defense absent a transcript. (*Ibid.*) The prosecution's burden is to overcome the presumption of need or, alternatively, to show the "'"availability of alternative devices that would fulfill the same functions of a transcript."'" (*People v. Tarver* (1991) 228 Cal. App. 3d 954, 957, quoting *People v. Hosner, supra*, 15 Cal.3d at p. 65.)

In *Hosner,* the court ruled "the erroneous denial of an indigent defendant's motion for a trial requires automatic reversal." (*People v. Hosner, supra,* 15Cal.3d at p. 70.) The court explained, "in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." (*Ibid.; see also People v. Bigelow* (1984) 37Cal.3d 731, 745.)

Here, assuming Kennedy's request for the additional portions of the transcript was timely, the court should have provided it. We cannot, however, hold denial of the request for the additional material was reversible error. In providing a transcript of the testimony, the court substantially complied with the *Hosner* requirement. In contrast to *Hosner,* where the defendant was entirely denied a transcript of his prior trial, Kennedy *was* afforded a free transcript of all the testimony. He thus had available those crucial portions which might be necessary, as suggested *in Hosner,* for the purposes of impeaching witnesses and rebutting evidence. We decline to extend the rule in *Hosner* to require per se reversal when, with defense counsel's acquiescence, the court provides to an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript.

Kennedy has not shown the court's denial of his request for the additional portions of the trial was prejudicial. As an example of prejudice Kennedy points only to the fact that before the first trial defense counsel requested that if Kennedy's statement to a police officer Mendez was mentioned, that any gang reference be excised. She asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated such was his intention and he had

mentioned it to Mendez. He noted the evidence could become relevant should Kennedy and Tucker minimize their relationship with each other. The court indicated gang membership would not be mentioned, unless it became relevant during trial. Mendez did not testify at the second trial. Detective McDowell, however, testified after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz," and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [sic] want to be gang members." The prosecutor questioned whether the term was used to refer to someone from one's own neighborhood, and McDowell agreed. This allusion to gang membership was not significant. Kennedy has not shown prejudice. Any error in not providing the additional portions of the transcript was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386U.S. 18, 24.)

III

Kennedy contends the court's refusal to order the additional portions of the transcript forced him to forfeit his right to "self-representation and required him to have new counsel takeover his defense on the same day as the retrial began. He claims had the court conducted a complete inquiry into his decision it would have learned his waiver of his right of self-representation was not voluntary, but coerced by the court's denial.

This contention is without merit. As explained above, the court's refusal to provide a full transcript is not reversible error. Further, when Kennedy decided to give up his right to self-representation arid chose to be represented by his advisory counsel, he offered no reason for his action. Nothing in the record supports his present assertion he decided not to represent himself because the court did not provide him with the additional material he requested.

IV

Kennedy asserts the court erred in failing to grant his motion for acquittal at the close of the prosecution's case-in-chief when the evidence presented up to that time did not support a conviction.

On a motion for acquittal under section 1118.1 the trial court must employ the same test as that applied by an appellate court in determining whether the evidence supports a conviction. (*People v. Bloyd* (1987) 43 Cal. 3d 333, 350.) The court must decide "'whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations].'" (*People v. Rice* (1988) 200 Cal. App. 3d 647, 651, quoting *People v. Valerio* (1970) 13 Cal. App. 3d 912, 919.) "Where the trial court has denied the motion, the appellate court must assume in favor of the judgment every fact from which the jury could have reasonably deduced from the evidence that the offense was by the defendant." (*People v. Rice, supra,* 200 Cal. App. 3d at p. 651.) On appeal the test is not whether the evidence at trial established the defendant's guilt beyond a reasonable doubt, but whether "'"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*Ibid.*, quoting *People v. Towler* (1982) 31Cal. 3d 105, 117.)

The court did not err in denying Kennedy's motion for acquittal under section 1118.1. First, contrary to Kennedy's argument that he was not a direct perpetrator, McDowell did not deal only with Tucker. Kennedy did participate in the sale. When McDowell looked across the street, he first made eye contact with Kennedy, nodding toward him, indicating he was asking Kennedy if he were selling drugs, and Kennedy signaled to him to cross the street. After McDowell came across, Tucker asked him what he wanted and McDowell said he

wanted a 2-0. Kennedy took McDowell's money and told Tucker to "give it to him, cuz" When McDowell complained it was not enough, Kennedy told him to comeback later.

Kennedy's arguments there was no evidence he agreed to make a sale or aided and abetted the sale also are without merit. After McDowell asked for a 2-0, Kennedy accepted his money and directed Tucker to give it to him. It is reasonable to interpret these actions as an agreement and sale. The court properly denied the motion.

V

Kennedy also maintains the evidence introduced during the entire trial is insufficient to support the conviction.

In reviewing the record to determine whether a verdict is supported by the evidence, an appellate court

> "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal. 3d 557, 578.)

Review is not limited to the evidence supporting the respondent, however. The court must look at the whole record and determine whether evidence of each essential element is substantial. (*Id.* at p. 577.) "The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Bloom* (1989) 48 Cal. 3d1194, 1208.)

The evidence supports the jury's verdict Kennedy sold a substance in lieu of a controlled substance. His acceptance of the $20 after McDowell had asked for a 2-0 is consistent with an agreement to sell drugs. It is not significant that the police did not find any drugs. He was convicted of selling a noncontrolled substance in the guise of an illicit substance. Substantial evidence supports the judgment.

VI

Kennedy next maintains the court prejudicially erred by instructing that only general intent is necessary for commission of the charged crime.

We first note during discussion on jury instructions the defense objected to the giving of CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). The prosecutor stated the instruction was not necessary because the crime was one of general intent and defense counsel said, "That's true." When the judge stated he would instruct with CALJIC No. 3.30 (Concurrence of Act and General Criminal Intent), the attorneys made no comment. It is arguable that the defense's objection to the giving of an instruction on specific intent precludes any claim of error on appeal. (*See People v. Barnard* (1982) 138 Cal. App. 3d 400, 409-410.)

In any event, the court properly instructed on the issue. When a controlled substance is offered for sale and a substitutes delivered the crime requires only a general intent. A specific intent to substitute a noncontrolled substance is an element of the crime only when delivery is not effected. (*People v. Lecblinski* (1976) 60 Cal. App. 3d 766, 769.)

The California Supreme Court stated in *People v. McDaniel* (1979) 24 Cal. 3d 661, 669, when a conviction of Health and Safety Code section 11355 is based on an offer to sell a

controlled substance, but no substance is actually delivered, the crime requires an intent to do some further act, so is a specific intent crime. The court stated,

> "'"When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve same additional consequence, the crime is deemed to be one of specific intent."'" (*Id.* at p. 669, quoting *People v. Daniels* (1975) 14 Cal. 3d 857, 860.)

The court in *People v. Lechlinski, supra*, 60 Cal.App.3d at page 769 held sale and delivery of a substance in lieu of a controlled substance is a general intent crime. The Supreme Court in *McDaniel* ruled the holding in *Lechlinski* is not inconsistent with its ruling in *McDaniel*. (*People v. McDaniel, supra,* 24 Cal. 3d at p. 670.) *People v. Sweet* (1967) 257Cal. App. 2d 167, 171; *People v. Contreras* (1964) 226 Cal. App. 2d 700, 702; and *People v. Lopez* (1963) 213 Cal. App. 2d 668, 675, upon which Kennedy relies for his argument specific intent is an element of the crime, all predate *McDaniel* and are inconsistent with *Lechlinski.* When a noncontrolled substance is not delivered there must be proof the defendant specifically intended to deliver a substance other than a controlled substance. But, if the noncontrolled substance is delivered, the crime does not require any intent to do a further actor achieve a further consequence. The only question is whether the defendant harbored the general intent to do the criminal act.

VII

Kennedy contends he was denied effective assistance of counsel when his attorney failed to request the court to instruct on the lesser related misdemeanor offense of distributing an imitation controlled substance (Health & Safe Code, § 109575).

Kennedy's attorney was not ineffective for failing to request the instruction. Our Supreme Court in *People v. Birks* (Aug. 31, 1998, No. S057191) ___ Cal. 4th ___ [98 L.A. Daily J.D.A.R. 9346] recently held a defendant is not entitled to instructions on lesser related offenses even upon request. Moreoer, distribution of an imitation controlled substance is not a lesser related offense of selling a substance in lieu of a controlled substance, but lesser only in terms of penalty. (*People v. Hill* (1992) 6 Cal. App. 4th 33, 44.) Under established case law Kennedy was not entitled to the instruction. Trial counsel "'is not required to make futile objections or motions merely to create a record impregnable to assault for claimed inadequacy of counsel.'" (*People v. Harpool*, (1984) 155Cal. App. 3d 877, 886.) Kennedy's counsel was not ineffective for failing to request it.

VIII

Kennedy asserts Health and Safety Code section 109575 is a special statute which preempts or acts as an exception to prosecution under the more general provisions of Health and Safety Code section 11355. He argues his conviction of violating Health and Safety code section 11355 is thus precluded by Health and Safety Code section 109575.

> "'"[W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as the exception to the general statute whether it was passed before or after such general enactment."'" (*People v. Jenkins* (1983) 28

Cal. 3d 494, 501, quoting *In re Williamson* (1954) 43Cal. 2d 651, 654.)

"A special statute does not supplant a general statute unless all of the requirements of the general statute are covered in the special statute." (*People v. Isaac* (1976) 56 Cal. App. 3d 679,683.)

Kennedy's conviction of violating Health and Safety Code section 11355 is not precluded by section 109575 of that code. Health and Safety Code section 109575 prohibits the knowing manufacture, distribution or possession with intent to distribute an imitation controlled substance. Health and Safety Code section 11355 prohibits offering to sell, furnish, transport, administer or give a controlled substance and then providing another substance in lieu of the controlled substance. The provider need not know the in lieu substance is a noncontrolled substance. Although the conduct prohibited under the two statutes is related, neither one is more specific or more general than the other. Kennedy's conviction of violating Health and Safety Code section 11355 is not precluded by section 109575 of the same code.

IX

Kennedy next asserts reversal is required because the prosecutor was allowed to introduce evidence his accomplice (Tucker) was convicted of the same offense for which Kennedy was on trial. He argues the trial court failed to weigh probative value of the evidence against its potential prejudice and admission of the evidence was prejudicial.

Tucker testified for the defense. He said when McDowell said "2-0", he answered, "no." He denied McDowell asked if he was serving, or that Kennedy said, "Give it to him, cuz." Tucker said he gave McDowell the piece of paper bag to get rid

of him, not with any intent to sell "bunk," nor with any representation as to its contents. During cross-examination of Tucker, the prosecutor, over defense objections, was allowed to ask Tucker whether he had been convicted of "this offense" to impeach his testimony that he had not participated in criminal activity on this occasion. Tucker said, "Yes."

Evidence Code section 352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption or time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Absent a clear showing of abuse, the trial court's exercise of discretion under this section will not be reversed. (*People v. Burrell-Hart* (1987) 192 Cal. App. 3d 593, 599.)

After the defense objected to the prosecutor asking Tucker about his guilty plea, the court asked whether the prosecutor was simply going to ask if he had been convicted of the crime, noting the defense's objection. The court's questioning shows it weighed the relevant factors before allowing proof of Tucker's conviction to impeach his testimony that he had committed no crime related to Kennedy's transaction. Because this evidence is direct evidence that Tucker testified falsely as to the details of the very charge Kennedy faced, the court did not abuse its discretion in permitting the question.

X

Kennedy argues the prosecutor elicited evidence of his in-custody status and gang membership. He complains during testimony McDowell unnecessarily identified him as the person with "a band on his wrist," alerting the jury to the fact he was in

custody. He also faults the prosecutor's asking McDowell what Kennedy meant by the word cuz after McDowell testified Kennedy told Tucker, "Give it to him, cuz." McDowell stated the term cuz is used by members of the Crip gang, those who want to be gang members and people from a person's neighborhood. The cuz definition was not relevant; however, there were no defense objections to the two questions which elicited it.

The reference to Kennedy's in-custody status consisted only of McDowell identifying him as "[t]he person at the defense table with a band on his wrist and goldish-brown shirt and hair straight back and goatee." McDowell does not show how he was prejudiced by these references and has waived the "gang affiliation" issue by not objecting.

XI

Kennedy argues his counsel was incompetent for failing to request that the court treat his current offense as a misdemeanor rather than a felony in order to avoid a three strikes sentence. He complains although defense counsel filed a statement in mitigation requesting the court strike his priors in the interest of justice, he failed to mention it had the authority to reduce his conviction to a misdemeanor, an authority of which the court is presumed to have been aware absent evidence to the contrary.. (Evid. Code, § 664.)

In *People v. Superior Court (Alvarez)* (1997) 14 Cal. 4th 968, 979, our Supreme Court held a trial court retains the power under section 17, subdivision (b) to reduce a "wobbler" offense from a felony to a misdemeanor under the three strikes law. In doing so, the court directed the sentencing court must consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the

trial.'" (*Id.* at p. 978.) The court additionally cautioned "any exercise of authority [to reduce the offense to a misdemeanor] must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; and the record must so reflect." (*Id.* at pp. 981-982.) There is no evidence the court was unaware of its authority under section 17 when it imposed sentence.

XII

Kennedy claims his sentence is cruel and unusual under the California and United States Constitutions because it is proportionately harsher than punishments for individuals convicted of more serious crimes.

We reject this argument. Kennedy's punishment is proportional to a habitual offender who has committed a felony and has one or more serious or violent felony convictions. Under the California Constitution, a punishment is cruel or unusual if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions human dignity. (*In re Lynch* (1972) Cal. 3d 410, 424, fn. omitted.) Proportionality is determined by examining "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id.* at p. 425); comparing the challenged penalty with punishments prescribed in the same jurisdiction for more *serious* offenses (*id.* at p. 426); and comparing it with penalties for the same crime in other jurisdictions (*id.* at p. 427). A penalty need not be disproportionate in all three areas to be cruel or unusual. (*People v. Dillon* (1983) 34 Cal. 3d 441, 487, fn. 38.)

Looking to the first prong on the *Lynch* test, Kennedy's personal and criminal characteristics do not suggest his sentence is cruel or unusual. He is being punished for selling a substance

in lieu of a controlled substance and for his recidivism. The fact the order in which the crimes were committed is determinative of his sentence does not make the punishment cruel or unusual. The second prong in *Lynch,* the punishment imposed is out of sync with punishment prescribed for more serious California crimes, is also not shown to have been violated. Kennedy committed serious and violent felonies in the past and has committed a new felony. His juvenile record begins with a theft offense at the age of 13, then continues to include t rue findings of burglary, battery, theft and disorderly conduct. In 1981, when Kennedy was 16, he and a companion forcibly raped a16-year old girl. Subsequent to his nine-year term for this offense, he had numerous parole violations. Kennedy's criminal history justifies his sentence under the three strikes law. As to the third prong under *Lynch,* which compares the punishment imposed with punishment, most other states have statutory schemes which provide for greater punishment for recidivists. The fact the California statutes does not require the third strike to be a serious or violent felony does not make Kennedy's punishment cruel or unusual. His constitutional argument fails.

XIII

Kennedy claims the three strikes law is unconstitutionally vague because it does not state with sufficient clarity whether pre-enactment felony convictions may be used as strikes.

We reject Kennedy's contention. We rejected this argument in *People v. Sipe* (1995) 36 Cal. App. 4th 468. We continue to adhere to the view addressed in that opinion. Kennedy has not shown himself to have been aggrieved by any perceived vagueness in the statute.

DISPOSITION

The judgment is affirmed.

/S/
WORK, Acting P.J.

WE CONCUR:

/S/
HALLER, J.

/S/
McDONALD, J.